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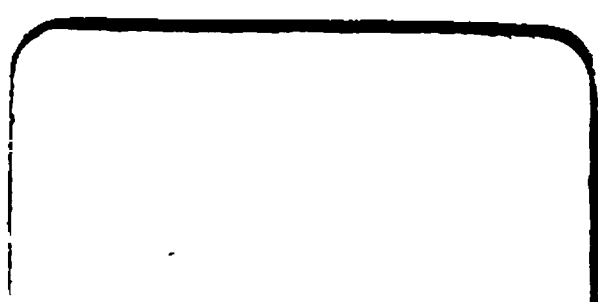
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

Vol. L.

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AMERICAN STATE REPORTS.

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AMERICAN STATE REPORTS.
VOL. L.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

STEPHENS v. SOUTHERN PACIFIC RAILROAD COMPANY.

[109 CALIFORNIA, 82.]

LANDLORD AND TENANT—COVENANT AGAINST LOSS BY FIRE.—Under a covenant in a lease between a railroad company and its lessee of land adjoining its depot grounds, providing that the lessor shall not be liable for damage by fire arising from any cause, the lessee cannot recover for the loss of a warehouse erected by him on the leased premises, caused by fire negligently set on adjoining lands of the lessor for the purpose of burning grass and rubbish.

VALIDITY OF COVENANT—PUBLIC POLICY.—A covenant in a lease, providing that the lessor shall not be liable for damage caused by fire, is valid and not opposed to public policy as increasing the risks and dangers to the public as to the destruction of its property by fire.

CONTRACTS—EFFECT OF SUBSEQUENT STATUTE.—A contract cannot be rendered invalid by a statute subsequently passed.

PUBLIC POLICY.—If a contract when made conforms to the public policy of the state, a change in public policy cannot avoid it.

F. Walker, for the appellant.

Van Ness & Redman, for the respondents.

87 **GAROUTTE, J.** The plaintiff Stephens was the owner of a certain warehouse, situated upon land adjoining the defendant's depot grounds, in the town of Hanford, California. The said land was held by Stephens under a lease from the defendant. One of the covenants of said lease was as follows: "And it is further agreed that the said party of the first part [defendant] shall not be responsible for any damage caused by fire, whether from railroad engines, or from the buildings of the said party of

the first part, or by fires caused from any other means, but the risk and damage, from whatever source, shall be alone sustained by the said party of the second ^{ss} part [Stephens].” Upon August 8, 1891, and while said lease was in force, the said warehouse was destroyed by fire, which had been kindled by defendant’s employees upon adjoining land for the purpose of burning the dry grass, rubbish, etc., thereon. At the time of said fire, the plaintiff Stephens was carrying insurance on said warehouse in the two insurance companies, plaintiffs, in the sum of nine thousand dollars. The insurance was paid, and this action was brought by the insurers and insured jointly to recover from the defendant the value of the premises so destroyed. The verdict and judgment were for the plaintiffs, from which judgment, and from a subsequent order denying its motion for a new trial, the defendant has appealed.

The trial court held the foregoing provision of the contract of lease void, as against public policy, and our attention shall be addressed to the consideration of that question, for, as we view the case, a solution of it is determinative of the litigation. The fact that the defendant is a common carrier has no place in the case. The rights of parties dealing with common carriers, and the duties of common carriers toward parties with whom they deal, and toward the public in general, are elements foreign to any question here involved. At that time it was not dealing with plaintiff Stephens as a common carrier, nor was Stephens contracting with it upon any such understanding or hypothesis. As far as this transaction was concerned, the parties, when contracting, stood upon common ground, and dealt with each other as A and B might deal with each other with reference to any private business undertaking. It follows that all those principles of law denying or restricting the right of common carriers to limit their legal liabilities for damages arising from injury to person or property stand upon a different plane, and are not controlling here.

Is this provision of the contract void as against public policy? That the principle of law involved is an original one, as applied to the present state of facts, is apparent, when we consider that but a single case has been found directly ^{so} in point, although it is evident from the argument that counsel upon both sides have industriously sought for precedent. This provision of the contract is declared by respondents to be opposed to public policy in this, that it has a tendency to lessen the amount of care that defendant would exercise, both in the selection and operation

of its machinery, and in the general conduct of its business, through its employees, in respect to the control of fire, the element here involved; that the undoubted effect of a contract exempting a party from damages flowing from his negligent use of fire is to increase the chances of conflagration; that is, one who is protected by an agreement against the results of his carelessness in this respect will not take the same care as he otherwise would; and, therefore, carelessness occasioned and caused by the agreement, increasing the probabilities of conflagrations, injuriously operates upon the interests of the public at large.

The foregoing line of reasoning is ingenious, but we cannot indorse it as sound in law. It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths, and here that horse would be carrying us beyond all limits ever reached before, if respondent's position should meet with our approval. While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts so recognizing have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound public policy, a court will never so declare. "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt": *Richmond v. Dubuque etc. R. R. Co.*, 26 Iowa, 191. "Before a court should determine a transaction which ⁹⁰ has been entered into in good faith, stipulating for nothing that is malum in se, to be void as contravening the policy of the statute, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical": *Kellogg v. Larkin*, 3 Pinn. 125; 56 Am. Dec. 164. "No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people": *Swann v. Swann*, 21 Fed. Rep. 299.

Turning our attention to this provision of the lease, let us concede, for present purposes only, this covenant to be opposed to the policy of the law, if its results are fairly and truly stated

by respondents. But we deny that such results would follow. Respondent's argument is, that the inevitable and necessary tendency of the covenant is to reduce, in some appreciable degree, the quantum of care exercised by the defendant in guarding against the destruction of the property of the public by fire; not the warehouse of the plaintiff Stephens, for, as between him and the defendant, considered alone, there can be no question as to the validity of the contract under consideration. It is the rights and interests of the public which it is claimed are infringed upon, and a trespass upon their interests and rights must be shown, or a case of the present character is a total stranger to any question of public policy.

Were the dangers and risks to the public as to the destruction of plaintiff's property by fire in any degree increased by the aforesaid covenant? Answering respondent's argument by a like argument, we say, no. It may be conceded that the covenant had the effect, as to plaintiff's warehouse, to lessen defendant's care in guarding against fire, but as defendant's care lessened the owner's care proportionately increased. Knowing that the defendant was absolutely absolved from any legal responsibility for its destruction by fire, we must assume ⁹¹ that plaintiff Stephens, the owner, in the protection of his building from the negligence of the defendant's acts, exercised a degree of care commensurate with the dangers that surrounded it; for it cannot be gainsaid that a man of ordinary business understanding, having bartered away any right of action for damages for destruction of his property by fire which might thereafter accrue from defendant, would increase his care and watchfulness in preserving his property from such destruction. We think it must be assumed that, in proportion as the amount of care exercised by defendant in the protection of this property from fire decreased, the amount of care exercised by plaintiff in its protection increased. Having sold his remedy for damages in case of fire, it behooved him to be ever on the alert in the protection of his property. Under any aspect of the case, this question is only material in view of the contingency of a spreading of the conflagration from the warehouse of plaintiff to the property of the public in general, for the whole argument concedes that, if the danger and risk by fire to the property of the public are not increased, then there is nothing whatever in the contention. And thus it is again made apparent to what distant and untrodden paths that unruly horse, public policy, will carry you, unless he be guided by a steady hand and a strong rein.

The remaining question presents itself: Is the result of this covenant necessarily to lessen the degree of care formerly exercised by the defendant toward the property of the public, and which the law ever enjoins upon it to exercise? In other words, are the probabilities of the destruction of the property of the public by fire communicated by defendant, not via the warehouse of plaintiff, but directly communicated, increased by reason of this covenant in the lease? It is argued that defendant's losses by fire, arising from its negligence, being materially reduced if a large number of these contracts were outstanding, it would necessarily become careless in the selection of its servants, and neglectful and over-economical ⁹² in the selection of modern machinery, and thus the dangers to the public by conflagration would be multiplied. We do not see that such result would follow. It must be borne in mind that the lessees of defendant under these contracts are no part of the public. Each one of them has sold his right as one of the public, and is not in a position to complain as to the burdens cast upon him as an individual. The public here are the people holding no leases. The defendant in this case not only owes the public the same duty after the execution of the lease that it did before, but there is no reason in the world why it would not perform that duty in the same way as it had done in the past, however careful or neglectful that performance might be. Why would not this be so, for the public had the same rights and the same remedies against the defendant after as before the execution of the lease, and likewise the defendant was liable for damages in the same amount, upon the same property, and upon the same facts? It thus appears that the contract in no way changed the relations and conditions existing between the defendant and the public, and such being the fact, no reason exists for a change upon its part in the manner of the conduct of its business. While it is true that the making of this contract withdrew plaintiff as one of the public, and, it may be said, thereby reduced the proportions of the public to that extent, still it would seem the refinement of absurdity to hold, for such reason, that, the public being reduced, the care exercised by defendant toward the public would be reduced pro tanto.

The late case of *Griswold v. Illinois Cent. Ry. Co.* (Iowa), 57 N. W. Rep. 843, in its facts is fully analogous to the case at bar, and, upon a rehearing and reargument, a similar covenant in a lease was sustained as in no manner contravening public policy. Especially is this case valuable as precedent when we pause to consider the stringent provisions of the code of that state in

dealing with the liability of common carriers for damages to property arising from fire and other ⁹³ causes. And doubly so in view of the further salient fact that the lease in that case upon its face appears to indicate that benefits to the lessor, in its capacity as a common carrier, would accrue by reason of the making thereof. These matters are not found in the case at bar, and to that extent the case occupies much broader ground than we are required here to take. The dissenting opinion of the learned chief justice is based, to some extent at least, upon these provisions of the Iowa code, and the further claim that the railroad company was acting in its capacity as a common carrier in making the lease, conditions which, we have already suggested, do not surround us here. The remaining objection of the learned chief justice to the validity of the judgment ordered by the majority of that court is in line with these respondents' contention, and we think unsound.

Farmer A is in the habit of burning his stubble field in the fall of the year. B leases from him a small portion of his farm for storage or residence purposes, there being a clause in the contract similar to the one here involved. Farmer A, in burning his stubble, allows the fire to escape from his control, and B's property is destroyed; or A is the owner of a powder factory, and leases to B an adjoining tract of land. This exemption damage covenant is placed in the lease; the powder plant explodes, and B's property is destroyed. These illustrations in principle are parallel with the case at bar. Both the farmer and the factory owner owed the duty to the public of exercising a certain degree of care, one in burning his stubble field, the other in carrying on his factory. If this covenant in the present case had the effect to lessen the degree of care exercised by defendant, it had the same effect in the lease of the farmer and the powder man. If the risks and dangers to the property of the public from fire were increased in this case by reason of the covenant, they were likewise increased in those cases. Yet it would seem a gross trespass upon the rights of parties to make contracts, to hold the covenant void as against the policy of ⁹⁴ the law in the hypothetical cases cited. To hold that the interests of the public were of such gravity, and were so interwoven into such a contract, as to vitiate the contract, would carry us far beyond any principle of law yet recognized by courts or law-writers.

If the doctrine enunciated by respondent be sound, then a multitude of contracts covering many and diverse subjects, and which are being entered into every day of the world, and recognized and acted upon both by parties and courts, must fall to the

ground. As a striking example, the ordinary contract of fire insurance cannot stand the test, for it cannot be gainsaid that such a contract necessarily has the tendency to lessen the care which the owner would otherwise exercise in the protection of his property from fire. Upon respondents' line of argument, such owner owes a duty to the public, possibly in the protection of his own property from fire, certainly in the protection of the property of the public, and, if his care is lessened in the performance of that duty by reason of the contract of insurance, then surely the dangers and risks to the property of the public are increased. Yet, notwithstanding this reasoning, courts everywhere have upheld this class of contracts, and repelled all assaults upon them as being opposed to the policy of the law. While it may not be found in the contract itself that the negligence of the owner in causing the fire shall be no bar to a recovery, it has been held always and everywhere that such is the law, even in the absence of express stipulation to that end; and an express stipulation, inserted in the contract in accordance with the general principle, would certainly in nowise weaken the doctrine. As sustaining this general principle, see *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507; *Waters v. Merchants' etc. Ins. Co.*, 11 Pet. 213; *Liverpool Steam etc. Co. v. Phenix Ins. Co.*, 129 U. S. 438.

Let us look at another class of contracts which have been sustained by the courts, but sustained wrongfully, ⁹⁵ if the soundness of the argument advanced by respondents can be maintained. Courts have sustained contracts made by common carriers with insurance companies, whereby property under their control, and in transit, has been insured against negligence of their employees: *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387; *Phoenix Ins. Co. v. Erie etc. Transportation Co.*, 117 U. S. 312. Following respondents' line of argument, surely such contracts would have a tendency to lessen the care otherwise exercised by common carriers in the transportation of goods, and would thereby trespass upon the rights of the public, and, so trespassing, would render void all contracts of that character. But the courts, after careful investigation, have arrived at a contrary conclusion.

To support the invalidity of this contract, counsel rely upon an act of the legislature found in the statutes of 1891, page 473, which declares a party guilty of a misdemeanor who starts fires in certain localities (without first taking certain precautions), whereby the property of an adjoining or contiguous owner is injured, damaged, or destroyed. If for no other reason, this act of

the legislature cannot be relied upon to assist respondents' case, for it was passed subsequent to the making of the contract, and, if the contract was valid when made, no subsequent act of the legislature can render it invalid. It is laid down as an elementary principle in *Greenhood on Public Policy*, that, if a contract conform to the public policy of the state when made, a change in public policy will not avoid it.

We conclude that the line of reasoning indulged in by respondents to support the invalidity of this contract is more specious than sound; that the interests of the public in the contract are more sentimental than real; and that such a contract violates no statute, conflicts with no principle of law, and in no way infringes upon public policy.

⁹⁶ For the foregoing reasons the judgment and order are reversed and the cause remanded.

Van Fleet, J., and Harrison, J., concurred.

Hearing in Bank denied.

THE CASE of *King v. Southern Pac. R. R. Co.*, 109 Cal. 96, was an action to recover the value of plaintiff's goods, stored by him in the warehouse owned by Stephens, and, with it, destroyed by fire under the circumstances mentioned in the principal case. Although King was paying storage on his goods, he had charge of the warehouse as the agent of Stephens, the owner, at the time of the fire. At the trial, the defendant offered to prove that the plaintiff had actual notice of the covenant in the lease to Stephens exempting the defendant from liability for property destroyed by fire. Under objection, defendant was not allowed to make the proof. The ruling of the court in this regard formed the main ground for appeal after judgment for the plaintiff.

The appellate court decided that King, as a bailor of goods stored in the warehouse, had a right to recover from the railroad company for their loss by fire, caused by its negligence, and that it was immaterial whether such bailor had notice or knowledge of the existence of the covenant in Stephens' lease or not. "He was in no sense in privity with Stephens. His right to recover grows out of, and is based upon, the fact that he was lawfully entitled to store his goods in the warehouse, without regard to the exemption clause of the lease made by the owner, and that, while so stored, they were destroyed through the negligence of the defendant's employees."

LANDLORD AND TENANT—COVENANT AGAINST LOSS BY FIRE.—"Damages by the elements" excepted from a lessee's covenant to repair include destruction by fire without the lessee's fault: *Van Wormer v. Crane*, 51 Mich. 363; 47 Am. Rep. 582.

CONSTITUTIONAL LAW.—ALL CONTRACT OBLIGATIONS are protected from impairment by the state legislature by the provisions of the federal constitution: *People v. Common Council*, 140 N. Y. 800; 37 Am. St. Rep. 563, and note.

VAN SANDT v. ALVIS.

[109 CALIFORNIA, 165.]

HOMESTEAD.—AFTER A MORTGAGE IS MADE to secure the purchase price of land, no homestead can be carved out of the property so as to impair the rights of the mortgagee.

HOMESTEAD — MORTGAGE OF — STATUTE OF LIMITATIONS.—If a purchaser of land, after giving a mortgage thereon for its purchase price, declares a homestead upon the mortgaged premises, and then applies to the mortgagee for an extension of time, and gives a new note and mortgage upon the homestead premises for the amount of the debt without his wife joining therein, the second mortgage is void as against the wife, but the first mortgage, having been satisfied only for the purpose of giving effect to the second one, is, in equity, deemed to be and remain in force until the demand secured thereby is barred by the statute of limitations, and, as to the part not so barred, it may be foreclosed against the homestead.

Nicol & Orr, and Baldwin & Thompson, for the appellant.

J. H. and J. E. Budd, for the respondent.

¹⁰⁶ SEARLS, C. This is an action to foreclose a mortgage upon the homestead of the defendants. Plaintiff had a decree of foreclosure, adjudging his claim, to the extent of two thousand four hundred and ninety-five dollars and twenty-eight cents, to be a lien upon the homestead and a personal judgment against defendant G. P. Alvis for the residue of indebtedness found due to plaintiff. Defendants appeal from so much of the decree as relates to the lien upon their homestead. The appeal was taken within sixty days after judgment, and the record contains a bill of exceptions.

The facts, as admitted by the pleadings and found by the court, may be summarized as follows: A. A. Van Sandt, plaintiff's testator, was the owner of certain lands situate in the county of San Joaquin, state of California, which, on the first day of October, 1883, he sold and conveyed to the defendant C. P. Alvis, for the sum of five thousand dollars, receiving in payment therefor one thousand dollars in cash and four promissory notes for one thousand dollars each, payable at one, two, three, and four years, with interest at eight and one-half per cent per annum, and, if not paid, the interest to be added to the principal and draw like interest, and, to secure the payment of said several promissory notes, said ¹⁰⁷ Alvis executed to his grantor, said Van Sandt, a mortgage upon the land so conveyed to him, which mortgage was duly recorded. Thereafter, and on the twenty-ninth day of June, 1886, defendant C. P. Alvis made and recorded a declaration of home-

stead, in due form, upon the land so conveyed to and mortgaged by him. The defendant Caroline Alvis was and is the wife of C. P. Alvis. A. A. Van Sandt died on the nineteenth day of January, 1887, leaving a last will and testament, and plaintiff is the duly appointed and qualified executrix thereof.

On the 1st of September, 1888, defendant C. P. Alvis, not having paid the promissory notes aforesaid, and being unable to pay the same, applied to the plaintiff herein for an extension of time to pay the same, and agreed that, if the time was extended, he would pay the same, and thereupon said C. P. Alvis made his promissory note for four thousand dollars, payable to plaintiff as administratrix (executrix), or her order, on or before four years, with interest at eight and one-half per cent per annum, and conditioned as in the former notes, and providing that, if the interest was not paid annually, the whole sum should become due at the option of plaintiff, and, to secure the payment thereof, said C. P. Alvis executed to plaintiff a mortgage upon the same premises covered by the first mortgage, and theretofore included in the homestead.

Plaintiff accepted and recorded the new mortgage, received the promissory note, satisfied the former mortgage of record, and delivered to said defendant the four old promissory notes. Defendant Caroline Alvis, the wife of the other defendant, had full knowledge of all the facts, acts, and representations of her husband in procuring an extension of the time of payment of said first notes, and consented thereto, but did not unite with her husband in the execution of the mortgage of 1888 upon the homestead.

The interest not having been paid upon the last-mentioned note, plaintiff elected to consider the whole ¹⁶⁸ amount due, and instituted this action in 1891, at which time three of the original promissory notes of 1883 were barred by the statute of limitations as against Caroline Alvis, and the court so found, and decreed the fourth note, which was not thus barred, to be a lien upon and secured by the mortgage upon the homestead.

From the foregoing statement of facts, it appears that no new indebtedness was sought to be created or secured by a lien upon the homestead. The indebtedness on account of the purchase price of the homestead, which was secured by the original mortgage thereon, was in part about to become barred by the statute of limitations, was, at the request of the defendant C. P. Alvis, extended at the same rate of interest and a new mortgage executed upon the same property.

As to the first mortgage which was executed by C. P. Alvis at

the date of his purchase of the premises to secure a portion of the purchase price thereof, no homestead could thereafter be carved out of the property, so as to impair the rights of the mortgagee: *Montgomery v. Tutt*, 11 Cal. 190; Civ. Code, sec. 1241, subd. 4. The first mortgage was, therefore, a valid lien upon the premises, prior in time and superior to the homestead claim.

The question in the case at bar relates, not to the power of the husband to encumber the homestead without the joint action of the wife, but is this: Was the execution of the new note and mortgage the creation of a new encumbrance, or simply a change of the form of the old encumbrance?

Swift v. Kraemer, 13 Cal. 530, 73 Am. Dec. 603, was a case in which one Revalk, an unmarried man, owned a lot of land upon which there were two mortgages, one of which, for fifteen hundred dollars, was held by Kraemer. Revalk married in 1857, and thereafter executed another mortgage, in which his wife did not join, upon the property previously covered by the two mortgages, and which in the interim had become a homestead of Revalk and wife. Kraemer had paid off one of the ¹⁶⁹ prior mortgages and satisfied the other, which constituted (except as to five hundred dollars) the consideration of the last mortgage.

The release of the old mortgages and the execution of the new one were on the same day. The court said: "But as to the debts secured by the original mortgage to Leck and Fontacelli and Kraemer, we regard the cancellation of the old mortgages and the substitution of the new as contemporaneous acts. It was not creating a new encumbrance, but simply changing the form of the old. A court of equity, looking to the substance of such a transaction, would not permit a release, intended to be effectual only by force of and for the purpose of giving effect to the last mortgage, to be set up, even if the last mortgage was inoperative. It would not permit Revalk to take Kraemer and Eisenhardt's money and apply it in extinguishment of a prior encumbrance, and then claim that the property should neither be bound by the new mortgage or the old," etc: Citing *Dillon v. Byrne*, 5 Cal. 455; *Birrell v. Schie*, 9 Cal. 106; *Carr v. Caldwell*, 10 Cal. 380; 70 Am. Dec. 740. See, also, *Tolman v. Smith*, 85 Cal. 280.

The case of *Barber v. Babel*, 36 Cal. 11, was one upon all fours with the case at bar, except that there the original note and mortgage were barred by the statute of limitations at the time of suit brought to foreclose, and the court held that as the original mortgage was barred, and as the wife had not joined in the execution of the second mortgage, no recovery could be had.

Sawyer, C. J., in his opinion at page 23 of the report, refers to and quotes from *Swift v. Kraemer*, 13 Cal. 530, 73 Am. Dec. 603, with apparent approval, and places the decision upon such bar of the first note and mortgage and the invalidity of the second mortgage.

It is very evident, in the case at bar, the first mortgage was only released to give effect to the second one, and, in a court of equity, the defendants should not be heard to say that the second mortgage is void by reason of not being executed by the wife, and at the same time ¹⁷⁰ to successfully contend that the release of the first mortgage extinguished it.

The complaint states the whole facts of the transaction, sets out both the mortgages, and asks that they be decreed to constitute but one security.

Under such circumstances, the court below was justified in holding as it did, in substance: 1. That the second mortgage upon the homestead was void, as against the wife, by reason of her not having joined in such mortgage; 2. That the first mortgage, having been satisfied only for the purpose of giving effect to the second one, will, in equity, be deemed to be and remain in force until the demand secured thereby is barred, etc; 3. That one of the notes secured by the first mortgage not being barred at the date of suit brought, a foreclosure upon the homestead could be decreed as to that note only.

That part of the judgment appealed from should be affirmed.

Belcher, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Harrison, J., Garoutte, J., Van Fleet, J.

HOMESTEADS.—RETROACTIVE HOMESTEAD LAWS IMPAIR THE OBLIGATIONS OF CONTRACTS, and are unconstitutional: *Extended note to Cusic v. Douglass*, 87 Am. Dec. 464.

HOMESTEAD—CONVEYANCE BY HUSBAND ALONE.—A conveyance of a homestead in which the wife does not join, is absolutely void, under a statute declaring that no conveyance affecting the homestead of a married man shall be of any validity, unless the wife joins in the execution thereof: *Pipkin v. Williams*, 57 Ark. 242; 38 Am. St. Rep. 241, and note. A mortgage of a homestead is not valid, unless signed by both the husband and wife: *O'Malley v. Ruddy*, 79 Wis. 147; 24 Am. St. Rep. 702, and note, with the cases collected.

DAVIS v. WARD.

[109 CALIFORNIA, 186.]

VENDOR AND VENDEE—BONA FIDE PURCHASER—NOTICE OF MISTAKE IN MORTGAGE.—The record of a mortgage, in which the land described does not belong to the mortgagor, does not give constructive notice of the mistake to the purchaser of the land owned by the mortgagor, and who has paid the purchase money without actual notice of the mistake. Such mistake cannot be corrected against him.

NOTICE—BONA FIDE PURCHASERS—BURDEN OF PROOF.—One who sets up the defense of subsequent purchase in good faith, without notice, must affirmatively show a purchase for value, and that the purchase money has been paid before notice.

NOTICE—PAYMENT OF PART OF PURCHASE PRICE.—One who claims to be a bona fide purchaser without notice, but has paid a part only of the purchase price before notice of an outstanding equity, is entitled to protection only as to the amount paid before such notice. The holder of the equity can enforce his claim to the whole land only upon condition of his doing equity by refunding to such purchaser the amount paid before notice.

PAYMENT OF PART OF PURCHASE MONEY AND MORTGAGE FOR REMAINDER.—If a purchaser, after paying part of the purchase price, executes a mortgage upon the land to secure notes for the remainder without notice of any outstanding equity against the land, and the mortgagee assigns such security and notes to a bank without notice to any of the parties of such equity, the notes operate as payment, and both the purchaser and the bank are protected as bona fide purchasers.

J. A. Hannah, for the appellant.

Bradley & Farnsworth, for the respondents.

¹⁸⁷ **McFARLAND, J.** This action was brought to have reformed (and foreclosed) a certain mortgage, executed October 8, 1891, by the defendant Ward to one Vancil, and duly recorded April 8, 1892, and by Vancil assigned to plaintiff. Brown, Fleming, and the Visalia Savings Bank were made defendants, as claiming some interest in the mortgaged premises. It is averred in the complaint that the mortgage was intended to be of the southwest quarter of the southeast quarter of section 13, and the northwest quarter of the northeast quarter of section 24, in township 18 south, range 25 east, Mount Diablo base and meridian; but that, by mutual mistake of ¹⁸⁸ the parties, the mortgage was made to describe the lands as situated in range 24; and the prayer is to have the mortgage reformed so as to describe the premises as being in range 25. Ward made default. Brown and Fleming answered, setting up that, after the execution of said mortgage, said Ward had sold and conveyed to Brown about one-half of the said land in range 25, and the remainder to Fleming; and that they were

bona fide purchasers for a valuable consideration and without notice of the mistake in said mortgage. (The description in the mortgage would have corresponded with lands bought by Brown and Fleming if the range had been 25 instead of 24.) The bank set up that it was the assignee and holder of two negotiable promissory notes given by Brown to Ward, and also assignee of a mortgage, given by Brown to Ward upon the said land purchased by Brown from Ward, as aforesaid, to secure said notes; and that it purchased said notes and mortgage for value and without notice, etc. The court granted a nonsuit as to Fleming, Brown, and the bank, and rendered judgment in their favor. From this judgment, and from an order denying his motion for a new trial, plaintiff appeals.

Appellant contends that purchase in good faith without notice, etc., is an affirmative defense, and that therefore the granting of the nonsuit was erroneous. But appellant put Brown and Fleming on the stand as his witnesses, and it was proved affirmatively by their testimony that they had no notice nor information of any kind in reference to the said mortgage by Ward to Vancil. It was also proven that Fleming was a purchaser for value, and that he had made full payment of the purchase money at the time of his purchase. The only question, therefore, as far as notice is involved, is whether or not they had constructive notice; and this question must, beyond doubt, be answered in the negative. They were concerned only with the land which they purchased, and were chargeable with constructive notice of whatever the record showed as to that land; ¹⁸⁹ and the record showed an unencumbered title to that land in Ward. If it was their duty to have known of the record of the mortgage to Vancil, an examination of that record would merely have shown that the mortgage there recorded was upon land six miles away from the land purchased by them; and the record of that mortgage was constructive notice only of "the contents thereof": Civ. Code, secs. 1213, 1214. It was not constructive notice of any mistake: *Chamberlain v. Bell*, 7 Cal. 293; 68 Am. Dec. 260; *Frost v. Beckman*, 1 Johns. Ch. 288; *Sanger v. Craigue*, 10 Vt. 555; 5 *Lawson's Rights, Remedies, and Practice*, sec. 2279; *Pomeroy's Equity Jurisprudence*, sec. 654. The case of *Erickson v. Rafferty*, 79 Ill. 209, cited by appellant, is not in point. There the subsequent purchaser in that case was so circumstanced as to be put on inquiry, and had been informed that there was a mortgage on the land.

So far, therefore, as respondent Fleming is concerned, the nonsuit was properly granted as to him, for it was shown that he was

a purchaser without notice, and had paid the purchase money in full. But the turn which the case took left Brown and the bank in a different position.

The authorities leave somewhat doubtful the point whether one setting up the defense of subsequent purchaser in good faith without notice must show that he had no notice (*Pearce v. Foreman*, 29 Ark. 568); but the general rule clearly is, that he must affirmatively show a purchase for value and that the purchase money had been paid before notice. There might, perhaps, be peculiar circumstances—such as investments for improvement of the property, etc., so that a purchaser could not be put in statu quo—which would take a purchase made wholly or partly upon credit out of the rule, but the general rule is as above stated: *Eversdon v. Mayhew*, 65 Cal. 167; *Scott v. Umbarger*, 41 Cal. 419; *Combination Land Co. v. Morgan*, 95 Cal. 552; *Isenhoot v. Chamberlain*, 59 Cal. 639; *Boone v. Chiles*, 10 Pet. 210; *Wells v. Morrow*, 38 Ala. 128; *Jewett v. Palmer*, 7 ¹⁹⁰ Johns. Ch. 68; 11 Am. Dec. 401. In *Eversdon v. Mayhew*, 65 Cal. 167, this court, speaking of one claiming protection as bona fide purchaser, declares that he must aver and prove “the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment, for if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser.” In *Jewett v. Palmer*, 7 Johns. Ch. 68, 11 Am. Dec. 401, Chancellor Kent says: “A plea of a purchase for a valuable consideration, without notice, must be with the money actually paid; or else, according to Lord Hardwicke, you are not hurt. The averment must be, not only that the purchaser had not notice at or before the execution of the deeds, but that the purchase money was paid before notice. . . . Even if the purchase money be secured to be paid, yet if it be not in fact paid before notice, the plea of a purchase for a valuable consideration will be overruled.” There are numerous cases to the same effect in addition to those above cited.

Now, in the case at bar, while the evidence did show that Brown purchased without notice, it also showed that the purchase price was something over thirteen hundred dollars, and that Brown had actually paid only about two hundred dollars, and had given his promissory note to Ward for the balance of the purchase money, with a mortgage on the land which he purchased from Ward as security for the note. Nothing had been paid when this suit was commenced, except “about two hundred dollars,” and no circumstance is shown that would take the case out of the rule

above stated. He made the purchase about October 14, 1892, and says he heard of the mortgage about two months afterward; and this present action was brought within three months after his purchase, and when he had notice of the commencement of the action he had paid only two hundred dollars of the purchase money.

As to the bank, there is no evidence whatever of the condition or validity of its claim, no evidence at all ¹⁹¹ upon the subject. The bank joined with Brown in an answer in which it is alleged that Brown made two promissory notes to the order of Ward, each for five hundred and seventy-three dollars, and executed to him a mortgage upon the land in question to secure said notes; that Ward assigned said notes and mortgage to the bank; and that the bank took said assignment without notice of the mistake in the mortgage to Vancil. There is also, we think, a sufficient averment in said answer that the bank purchased said notes and mortgage for a valuable consideration. If these averments had been proven, the case would have assumed a very different aspect. If the notes and mortgage were actually assigned to the banks for value paid to Ward by the bank before any notice, then Brown's defense to the notes of failure of consideration was cut off, and the defense of both Brown and the bank to this action would be complete, for, in that event, the notes would have been payment: *Partidge v. Chapman*, 81 Ill. 137; *Freeman v. Deming*, 3 Sand. Ch. 327; *Baldwin v. Sager*, 70 Ill. 503; *Pomeroy's Equity Jurisprudence*, sec. 751, and notes. But there is no proof whatever that these averments were true.

Therefore, as the case stood at the time of the nonsuit, the evidence merely showed that Brown had paid only a small part of the purchase money. No other facts material to the subject were shown. Under these circumstances he was entitled to protection only to the extent that he was—to use the expression of Lord Hardwicke—"hurt." The rule therefore applies, "that where a part only of the price or consideration has been paid before notice, either the defendant should be entitled to the position and protection of a bona fide purchaser pro tanto, or that the plaintiff should be permitted to enforce his claim to the whole land only upon condition of his doing equity by refunding to the defendant the amount already paid before receiving the notice": *Pomeroy's Equity Jurisprudence*, sec. 750. In *Combination Land Co. v. Morgan*, 95 Cal. 552, Beatty, C. J., ¹⁹² speaking for the court in Bank, said: "The authorities cited in appellant's brief amply sustain the proposition that notice before payment is equivalent to notice before purchase, and that when there has been a partial

payment before notice to a second vendee of the original vendor's lien, he is affected pro tanto as to the residue." Of course, the principle is as applicable to an unrecorded mortgage as to a vendor's lien: See, also, *Burton v. Reagan*, 75 Ind. 77.

The judgment and order denying a new trial should be affirmed as to respondent Fleming; but the order granting a nonsuit in favor of respondent Brown and the bank was erroneous, and as to them the judgment must be reversed and a new trial granted. The new trial should be conducted in accordance with the views hereinbefore expressed; and the parties should be allowed to make proper amendments to their pleadings, if they so desire.

The judgment and order appealed from are affirmed as to the respondent George A. Fleming; and as to the respondents Thomas Brown and the Visalia Savings Bank, the judgment and order are reversed, and the cause remanded for a new trial.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

VENDOR AND PURCHASER.—A RECORD in which the description of land conveyed by deed is omitted does not impart constructive notice to a subsequent purchaser in good faith, without actual notice of the conveyance: *Chamberlain v. Bell*, 7 Cal. 292; 68 Am. Dec. 260, and note.

EVIDENCE—BURDEN OF PROOF—BONA FIDE PURCHASER. A subsequent purchaser is, in Illinois, presumed to be a purchaser for value, and the burden of proof is on the party attacking the conveyance to show bad faith and want of consideration: *Anthony v. Wheeler*, 130 Ill. 128; 17 Am. St. Rep. 281, to which is appended an extended note fully discussing the subject.

VENDOR AND PURCHASER.—What amount of the purchase price must be paid in order to constitute one a purchaser for value is the subject of the monographic note to *Bailey v. Smith*, 84 Am. Dec. 401. Payment in full before receiving notice of an equity is essential to constitute a bona fide purchaser: *Dugan v. Vattier*, 3 Blackf. 245; 25 Am. Dec. 105; and the fact that the purchase money was secured but not paid before notice will not sustain the plea of bona fide purchaser: *Jewett v. Palmer*, 7 Johns. Oh. 65; 11 Am. Dec. 401.

**MARYSVILLE ELECTRIC LIGHT AND POWER COMPANY
v. JOHNSON.**

[109 CALIFORNIA, 192.]

CORPORATIONS — LIABILITY ON STOCK SUBSCRIPTIONS—CONDITIONS PRECEDENT.—A contract to subscribe for shares in a corporation to be thereafter formed does not become binding or create a liability until all conditions precedent upon which the contract is made have been performed, and no liability is incurred, unless the corporation which is organized is the specific corporation contemplated at the time of the agreement.

LIABILITY ON STOCK SUBSCRIPTION — ADDITIONAL PURPOSE OF CORPORATION.—A subscriber, who contracts to take stock in a corporation to be formed for a certain and specified purpose, cannot, without his consent, be compelled to pay money toward the formation of a corporation for an additional and distinct purpose.

ORGANIZATION — AGENCY.— Stock subscribers present at the organization of a corporation are agents for absent subscribers only for the formation of such a corporation as has been agreed upon by all of the subscribers. If those present go beyond the bounds set, and form a corporation with additional and distinct purposes, they exceed their authority, and their acts, as to absent and nonconsenting subscribers, are void.

C. A. Webb and W. G. Murphy, for the appellant.

W. H. Carlin, for the respondent.

194 SEARLS, C. This is an action by the plaintiff, a corporation, to recover from the defendant one thousand dollars upon his agreement to take stock in a corporation thereafter to be formed.

The agreement was executed by defendant and some thirty-six others on the twenty-fifth day of March, 1890, and is in the words and figures following:

“For the purpose of forming a corporation to have for its object the furnishing of the incandescent system of electric lighting to those who may desire the same, and to provide the funds for the purchase of the necessary plant;

“We, the undersigned, hereby subscribe for stock to the amount set opposite to our respective names.

“Amounts to be due and payable upon the formation of the company and the issuance of the stock.”

Then follows the list of names signing the agreement, with the amounts by them severally subscribed, among which is the name of defendant, who subscribed one thousand dollars.

On or about the twenty-ninth day of March, 1890, the subscribers to the agreement, or a portion of them, met and organized

the corporation, plaintiff herein, under the laws of the state of California.

The second section of the articles of incorporation defines the objects of the corporation as follows:

"That the purpose for which it is formed are producing electricity for light and power."

Defendant did not participate in the formation of the ¹⁹⁵ corporation, consent thereto, or in any way waive any of his rights under the agreement.

The facts are simple, and involve the single proposition as to the liability of defendant to pay one thousand dollars to a corporation formed for the purpose of "producing electricity for light and power," under his agreement to pay said sum "for the purpose of forming a corporation to have for its object the furnishing of the incandescent system of electric lighting to those who may desire the same, and to provide the funds for the purchase of the necessary plant."

That the agreement in question was valid and binding upon the parties, and sufficient in law to authorize the plaintiff, if organized as a corporation in consonance therewith, to maintain an action to recover the sum agreed to be paid, is well settled: *San Joaquin Land and Water Co. v. Beecher*, 101 Cal. 70; *Marysville Electric Light Co. v. Johnson*, 93 Cal. 538; 27 Am. St. Rep. 215; *Monterey etc. R. R. Co. v. Hildreth*, 53 Cal. 123; *San Joaquin Land and Water Co. v. West*, 94 Cal. 399.

Morawetz, in his work on Private Corporations, at section 52, in discussing the contract of membership, says: "An offer or contract to become a shareholder in a corporation, or to subscribe for shares thereafter, does not become binding or create a liability until all conditions precedent, upon which the offer or contract is made, have been performed": Citing *Lake Ontario Shore R. R. Co. v. Curtiss*, 80 N. Y. 219; *People's Ferry Co. v. Balch*, 8 Gray, 310; *Goff v. Winchester College*, 6 Bush, 443; *Edinboro' Academy v. Robinson*, 37 Pa. St. 210; 78 Am. Dec. 421; and adds: "It is plain that no liability is incurred, unless the corporation which is organized is the specific corporation which was contemplated at the time of the agreement": *Machias Hotel Co. v. Coyle*, 35 Me. 405; 58 Am. Dec. 712; *Wallingford Mfg. Co. v. Fox*, 12 Vt. 304; *California Sugar Mfg. Co. v. Schafer*, 57 Cal. 396.

Defendant subscribed for stock to the amount of one thousand dollars, "for the purpose of forming a ¹⁹⁶ corporation having for its object the furnishing of the incandescent system of electric

lighting, and to provide the funds for the necessary plant."

The formation of a corporation for such purpose was a condition precedent to the right of plaintiff to recover. Until it has done so, it is not perceived upon what theory it can compel payment. If plaintiff can add the element of a power company to its attributes, upon the same principle it may adopt any other function and still hold the defendant liable.

An individual may be quite willing to contribute his money and assume the responsibilities of a stockholder in a corporation to furnish light, and at the same time decline to embark in an enterprise to furnish power, or to engage in other and distinct branches of business.

It is sufficient to say that defendant only agreed to pay his money for stock in a corporation for lighting purposes, and that he cannot, under his contract, without his consent, be compelled to pay money toward the formation of a corporation for an additional and distinct purpose.

Appellant contends that, for the purposes of the organization of the corporation, the subscribers present were the agents for those subscribers who were absent, and in support of the proposition cites *West v. Crawford*, 80 Cal. 19.

The answer to this contention is that, if the subscribers with defendant are to be deemed his agents in the formation of a corporation, the extent of their authority as such agents only went to the formation of such a corporation as had been agreed upon, and when they went beyond the bounds thus set they exceeded, as against the nonconsenting defendant, their authority, and their acts as to him were void.

This conclusion reached, it follows that the plaintiff is not entitled to recover, and that other questions involved need not be considered.

The judgment appealed from should be affirmed.

197 Haynes, C., and Vancief, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

McFarland, J., Temple, J., Henshaw, J.

CORPORATIONS—SUBSCRIPTION TO STOCK—WHEN BINDING.—A subscription of moneys, to be paid to a corporation not yet existing, is enforceable by it only after it comes into existence: *Richelieu Hotel Co. v. International etc. Encampment Co.*, 140 Ill. 248; 83 Am. St. Rep. 234, and note; *Hudson Real Estate Co. v. Tower*, 156 Mass. 82; 32 Am. St. Rep. 434, and note; *Bryant's Pond etc. Mill Co. v. Felt*, 87 Me. 234; 47 Am. St. Rep. 323, and note.

VERMONT MARBLE COMPANY v. BROW.

[109 CALIFORNIA, 236.]

SALES UPON CONDITION.—A consignment of goods to the consignee, under a contract stipulating that he shall sell the goods to some third person, that, until they are so sold, he is under no obligation to pay the consignor the cost price, and, until so sold, he may be compelled to surrender the goods to the consignor at any time, is a sale upon condition. Prior to sale by the consignee to a third person, the former has no title to the goods which can be the subject of levy or sale upon execution for his debts.

RETENTION OF TITLE.—THE SELLER OF GOODS MAY, by appropriate contract, retain the title thereto until performance of some valid condition on the part of the buyer. The fact that the property is to be resold by the latter does not affect the rule.

WRITTEN CLAIM OF PROPERTY LEVIED UPON in the hands of one who holds it under a conditional sale, notifying the sheriff that the claimant is the owner of the property, that the execution debtor holds it only for the purposes of resale, that he held it when seized for such purposes only, and not otherwise, sufficiently states the grounds of title required by section 689 of the Code of Civil Procedure of California.

Section 689 of the Code of Civil Procedure, referred to in the opinion of the court, declares that no claim to property levied upon by a sheriff is valid as against him, unless the person by whom it is claimed shall make a verified claim thereto, setting out his title, his right to the possession, and the grounds of such title, and shall serve such claim on the sheriff.

Forbes & Dinsmore, for the appellant.

W. H. Carlin, for the respondent.

²³⁷ BRITT, C. Defendant was constable of Marysville township in Yuba county, and was sued in this action by plaintiff, a corporation, for the value of certain marble monuments sold by him July 10, 1893, under writs of execution issued from the justice's court of said township against the property of one Plymire, upon judgments obtained there by creditors of Plymire. The chief question involved is, whether the marble, when ²³⁸ levied upon and sold, was the property of plaintiff or of said Plymire. The latter had a marble-shop at Marysville, and was a dealer in funerary stones and monuments; he had been accustomed for several years to purchase from plaintiff unfinished monuments and other marble needed in his business, and, on July 19, 1892, he was in plaintiff's debt some two thousand five hundred dollars for such materials purchased previously to that time, and plaintiff was apprehensive that further sales to him outright would involve loss; to prevent this, Plymire agreed in writing with the

marble company, on the date last mentioned, that, in consideration of its sending to him certain specified monuments "on consignment," he would hold the same as the property of the company until sold, and subject to its order; that as fast as he sold the monuments he would remit the money—the cost price at which each was listed to him—and when he took notes in lieu of cash he would remit the notes as collateral for his account. Subsequently, in May, 1893, Plymire agreed with plaintiff for a further consignment of goods, specifically described, written memoranda of which agreement provided in substance that he should keep an account of the sale of the monuments described in a book, and send such book to the marble company on the first of each month, and, "as fast as said work is sold and erected," pay to the company the list or cost price to him of each piece of marble sold by him, "either by cash or customer's note," the same to be placed to his credit as fast as cash should be received; that he held the marble merely on consignment to be paid for when sold, and that it remained the property of the marble company "until paid for, as above," and at all times subject to its order. Ten monuments, of the value of six hundred and eighty-three dollars, were converted by defendant, as the court found, and of these, three had been delivered to Plymire under his arrangement with plaintiff of July, 1892, and seven under that of May, 1893. By the terms of an oral agreement not embodied in said written memoranda, Plymire promised that, whenever he received payment from a customer for a monument, he would pay plaintiff an additional sum of twenty-five per cent on the cost price charged him for the same by plaintiff; which further percentage was to be applied on his indebtedness of two thousand five hundred dollars existing before July, 1892. The debts on which the judgments mentioned were recovered against Plymire accrued prior to the receipt by him of any part of the goods in controversy.

Plymire, it was further understood, would take orders for and sell the marble in his own name; he had the right to fix the selling price and the terms of sale; he was to bear the cost of transporting the marble from San Francisco to Marysville; apparently, the marble company exercised no control over his business. The monuments, when seized by defendant, were in the same condition as when received by Plymire from plaintiff, he having done no lettering or other work on them. He testified at the trial: "I was not to sell these monuments in the same condition that I received them. . . . I have to sell them first and then put on the inscription. . . . If a man wanted a design, I showed

him a style of monument and told him what it would come to when finished and set up; found out how he wanted it lettered, whether he wished any further design carved on it, and then fixed it up, put a bottom base on it, set it up, and then took the money for it." Before the execution sale plaintiff demanded the property of defendant, the particulars of which demand appear in another connection.

Appellant contends that the facts stated evidence a sale on credit, in which the title to the goods passed at once to Plymire, and they thus became liable to execution for his debts, and it is said that it is "unmeaning for parties to a contract to say it shall not amount to a sale when it contains every element of a sale." This latter proposition is doubtless correct; the transaction must be judged by the intent of the parties to it, gathered ²⁴⁰ from the whole scope and effect of their language and their explanatory conduct; mere verbal formulas are to be disregarded if inconsistent with a specific intent thus manifested. But, looking at the facts in the light of this principle, we find no transmission of title to Plymire. "Mere transfer of possession without the agreement, express or implied, that such transfer is a sale on the one hand, and a purchase on the other, will not be a sale or have the effect to transfer the title": *Borland v. Nevada Bank*, 99 Cal. 94; 37 Am. St. Rep. 32. We consider that the true nature of the transaction was that of a sale upon condition, the condition being, as to each monument, that Plymire should sell the same to some third person; until then he was under no obligation to pay plaintiff the cost price, and until then he was compellable to surrender the goods to plaintiff upon demand. When he sold a monument he was precisely within the case put by Mellish, L. J., in *Ex parte White*, 6 L. R. Ch. App. 397, 405: "If A hands over his goods to B, and B is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and B then sells to C, the natural inference from these facts is, beyond all doubt, that there is a sale made to B, and another sale from B to C." But obviously there is no completed sale to B until he sells to C; this is illustrated in *Nutter v. Wheeler*, 2 Low. Dec. (U. S. Dist. Ct.) 346; there W. & Co. were in the habit of sending their manufactured goods to one Gear in Boston, and Gear sold them at such prices and on such terms as he pleased, not less than the trade prices fixed by W. & Co; whenever he made a sale he was to pay W. & Co. in thirty days the prices shown in their list to him, less an agreed discount; after a sale was made by him his credit only was looked to by W. & Co; Gear became bankrupt, and W. & Co. took back the

goods of their manufacture in his shop unsold. The court said: "Until a sale was made, the property in the goods remained in the defendants [W. & Co.], and they were well justified in reclaiming those which remained on hand at the time of the failure ²⁴¹ of Gear." So, in our opinion, at the time of the levy and sale by defendant here, the monuments were the property of plaintiff and not liable to execution for Plymire's debts.

As suggested by appellant, there may be impolicy in allowing a severance of title and possession where an ultimate sale is designed by the parties, but this consideration is for the legislature and not the courts; the common-law right of the seller, by appropriate contract, to retain the title until the performance of some valid condition on the part of the buyer has been long recognized in this state, as almost universally elsewhere: *Putnam v. Lamphier*, 36 Cal. 151; *Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 597; *Sere v. McGovern*, 65 Cal. 244; *Benjamin on Sales*, Bennetts' (6th ed.), 255, 282, et seq. That the property is to be resold by the first (conditional) purchaser does not affect the rule: *Hirsch v. Steele*, 10 Utah, 18, and cases cited.

Appellant further argues that the written claim to the marble in question served on him by plaintiff prior to the execution sale, under section 689 of the Code of Civil Procedure, is defective in the manner of "setting out the title" and in "stating the grounds of such title," as provided in that section. Waiving the question whether the statute referred to imposes a condition precedent to the right to maintain the action, we think the objection is not tenable; the writing stated, among other things, that plaintiff is the owner of the property, and had delivered it to Plymire for purposes of sale, and that he held it when seized by defendant for those purposes, and not otherwise. The phrase, "grounds of such title," in the code section is not very definite, but we suppose it has reference to the reasons why the claimant avers himself to have a title superior to that of the execution debtor; and the explanation in this instance of the manner in which such debtor acquired possession of the property from the claimant, coupled with a statement of the claimant's ownership, seems to be all that should be required in such a case. Some other points ²⁴² are made concerning rulings on matters of evidence at the trial, but they are unimportant; if all were determined in appellant's favor, we cannot see that the result could be affected. The judgment and order appealed from should be affirmed.

Searls, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

THE CASE of Holt Mfg. Co. v. Ewing, 109 Cal. 353, was an "action in claim and delivery of personal property. On July 8, 1893, the Holt Manufacturing Company entered into a contract with T. S. Ewing, under which an 'improved link belt combined harvester No. 426' was delivered by respondent to said T. S. Ewing, for which said Ewing agreed to pay the sum of \$1,650, and, to secure the same, executed two promissory notes, each for the sum of \$825—the first to become due September 1, 1892, and the second, September 1, 1893. By said contract, which was denominated a lease, it was stipulated that, 'the Holt Manufacturing Company do not part with their title to said harvester until said deferred payments, or notes, are fully paid; that time is of the essence of the agreement; that should the undersigned (T. S. Ewing) make default in any of the payments, then said Holt Manufacturing Company shall, at their option and without notice, terminate this agreement, and, with or without legal proceedings, take and retain said harvester wherever it may be situated, and all moneys paid by the undersigned prior to such default shall be compensation for the privilege of using said harvester prior to such default.' There was paid on said first promissory note, on October 3, 1892, \$500, and on January 11, 1893, \$100. Said T. S. Ewing died intestate on March 23, 1893, and the defendant, Rosa V. Ewing, was, on the twenty-ninth day of April, 1893, duly appointed administratrix of his estate, and on May 18, 1893, letters of administration were duly issued to her. Afterward, the plaintiff presented to said administratrix its claim upon said promissory notes for the balance of \$249, then due upon the first note, and the amount to become due upon the second, of \$884.50, in all, \$1,133.50. This claim was duly verified on May 20, 1893, and was allowed by the administratrix May 26, 1893, and allowed and approved by the court on June 24, 1893; and this action to recover possession of said property was commenced October 12, 1893. In the presentation of said claim to the administratrix, the plaintiff set out a copy of said promissory notes, with the credits upon the first, but did not set out the contract or lease, or make any reference whatever thereto. Upon this state of facts, the defendant contended that the plaintiff waived its right under said contract to retake the property, and elected to treat the transaction as an absolute sale, and is therefore estopped from asserting ownership to the property, or any right to recover possession thereof in this action. The cause was tried by the court, and findings and judgment went in favor of the plaintiff, and this appeal is by the defendant from said judgment and from an order denying her motion for a new trial. The so-called lease was, in fact, a conditional sale, under the terms of which the seller had either one of two remedies for the violation of the contract by the purchaser. It might, upon the default of the purchaser, in meeting the stipulated payments, or any of them, have retaken the property, or recovered its possession in an action of claim and delivery; or, on the other hand, treated the sale as an absolute one, and brought its action upon the notes to recover the contract price of the property sold. These remedies being inconsistent, the plaintiff could elect which he would pursue, but he could not have both: Parke etc. Co. v. White River Lumber Co., 101 Cal. 87, and cases there cited. The question, therefore, is whether the presentation of the plaintiff's claim for the unpaid purchase money to the administratrix of Ewing's estate, and its approval by her and the court, was such an election as debarred the plaintiff from pursuing its subsequent action to recover possession of the property, upon the assumption that the title had never passed to the purchaser." The supreme court held that it was such election.

In the case of *Rodgers v. Bachman*, 109 Cal. 552, it appeared that, on May 14, 1892, one Silva was the owner and in possession of certain sheep, and on that day entered into a written agreement with one Barberia and his copartners, signed and executed by all of the parties, as follows: "For and in consideration of the agreements hereinafter mentioned, I, the said Jose Sefreno Silva, of the first part, do hereby contract and agree to sell to the said Joaquin Coelho Barberia, and Joaquin Goncafus Denes, and Joaquin Coelho Dronelles, and Jose Martins, all being copartners, 2,132 sheep, consideration to be paid as follows, to wit: \$2,374.70 cash paid to-day, the receipt whereof is hereby acknowledged; the balance in two equal payments, \$1,559.65 payable May 1, 1893, \$1,559.65 payable October 1, 1893, all to draw interest at ten per cent per annum, interest payable annually. It is hereby contracted and agreed by all parties that the second parties are to take and run the aforesaid sheep until the expiration of the aforesaid named payments, free of charge, to the aforesaid Jose Sefreno Silva, to have the wool, and sell and dispose of the same, to run the sheep. It being further contracted and agreed that the sheep are to remain and be the property of said Silva, and that the title of the sheep is to remain in him and vest in him, his heirs and assigns, until the aforesaid payments are made. It is further contracted and agreed that the said Silva is to give a bill of sale at the time when all of the payments are made. It is further contracted and agreed by the second parties that in the event anything should occur, that they, the said second parties, should fail to cause the aforesaid payments to be made, or should fail to keep the sheep and their increase up to the present worth, then it is contracted and agreed that the said Silva, his heirs, order, or assigns, shall have the power to take possession of this band of sheep at any time, and sell the same to best advantage, and apply proceeds to the payment of this contract, and if any moneys be left, then same is to be paid to said second parties, their order, heirs, or assigns."

On the day the contract was executed, the parties of the second part took possession of the sheep, and on May 2, 1893, they made the second payment therein provided for. They remained in possession until August 8, 1893, when the sheep were sold and delivered to the defendant Bachman and others by the sheriff, under an execution regularly issued against Barberia and his copartners. In August, 1892, Silva sold and assigned his interest in the sheep to the plaintiff Rodgers, together with his interest in the above agreement. Defendants purchased with notice of plaintiff's claim to the sheep. The third payment to be made under the contract on October 1, 1893, was not made, and one year thereafter plaintiff demanded the sheep of the defendants, and, on their refusal, commenced this action for their recovery and obtained possession of them. Upon the trial of the case, defendants recovered judgment and plaintiff appealed. The appellate court, in deciding the case, held that the contract in question created a purely conditional sale, under which Silva, as the owner of the sheep, was entitled to recover them, as against a purchaser under execution sale against the bailees. The court also announced the following rules: "The owner of property may include in any executory agreement for its sale which he makes any conditions which he may desire to insert, and make their performance essential before he shall be deprived of his ownership; and he may sell upon condition that title shall not be divested until the price has been fully paid. . . . In the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction; and a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed." "The question is always one of intention, and whenever, upon a proper construction of the instrument, it is apparent that it was the intention of the parties that the sale should be conditioned upon the payment of the price, it is the duty of the court to carry out that intention."

SALES—CONSIGNMENTS FOR.—A consignment of goods to be paid for at a fixed price out of their proceeds when sold, where the contract is one of agency and there is no attempt at evasion, is a bailment for sale, and not a sale with reservation of title. The title remains in the consignor until the goods are sold to a bona fide purchaser for value, and they cannot be sold on execution to pay the debts of the consignee: *Barnes Safe etc. Co. v. Block Bros. Tobacco Co.*, 38 W. Va. 158; 45 Am. St. Rep. 846, and note. See, especially, the extended note to *Ætna Powder Co. v. Hildebrand*, 45 Am. St. Rep. 203.

CONDITIONAL SALE.—Where the vendor agrees to sell to the vendee personalty for a price to be paid in the future, and delivers possession, yet expressly retains title until payment, it is a conditional sale: Note to *Gerow v. Castello*, 7 Am. St. Rep. 282. See, also, the note to *Palmer v. Howard*, 1 Am. St. Rep. 63.

NICHOLS v. EMERY.

[109 CALIFORNIA, 323.]

TRUSTS—POWER OF REVOCATION.—If an owner of land conveys it to a trustee, upon certain trusts to be executed after the death of the grantor, reserving in the conveyance a power of revocation, and remaining in possession during his lifetime without exercising the power, the conveyance operates to immediately vest in the trustee so much of the estate as is necessary to carry out the purposes of the trust. The grantor retains a life estate entitling him to remain in possession, or to lease the land and retain the profits. The reservation of power to revoke the trust does not operate to destroy the conveyance as a trust, nor make it a will or testamentary disposition of the property.

WILLS.—THE TRUE TEST of the character of an instrument, as to whether it is a will, is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest. The essential characteristic of an instrument testamentary in its nature is, that it operates only upon, and by reason of, the death of the maker and is ambulatory, and that by its execution the maker has parted with no rights and divested himself of no part of his estate.

TRUSTS.—IT IS ESSENTIAL to the creation of a valid express trust, that some estate or interest be conveyed to the trustee, and, when the instrument creating the trust is other than a will, the estate or interest must pass immediately, but it is not essential that it must be enjoyed immediately. The enjoyment of the interest may be made to commence in future, and to depend, for its commencement, upon the termination of an existing life or lives, or of an intermediate estate.

TRUSTS—REVOCATION—RESERVATION OF POWER OF. The fact that a grantor in a conveyance creating a trust reserves a power of revocation, does not impair the trust, nor affect its character as such. It remains operative until the right to revoke is exercised in due form.

TRUSTS TO AVOID ADMINISTRATION.—A person may dispose of his property in his lifetime to avoid administration of his estate after death, either by gifts absolute during his life, or by gifts

in trust during his life, or by voluntary settlements, and such disposition shows, not only an absence of testamentary intent, but an absolute hostility thereto.

SETTLEMENTS—CONSIDERATION.—A fully executed, voluntary settlement for the benefit of the settler's children, does not require other consideration for its support than that of parental affection and duty.

B. F. Thomas, for the appellant.

C. A. Storke and V. Montgomery, for the respondents.

³²⁵ **HENSHAW, J.** Appeals from the judgment and order denying a new trial. The plaintiff set up in his complaint the following facts:

His father, Walter E. Nichols, during his lifetime, conveyed to plaintiff, as trustee, a piece of real property, upon certain trusts expressed in the deed, which were to sell the land within ten months after the death of the grantor, dividing the proceeds of the sale, one-fifth each to four named beneficiaries, the grantor's children, one being the trustee, while the remaining part was to ³²⁶ be invested by the trustee and the profits of the investment paid over to another child, a daughter, during the life of her husband, and upon his death, if she survive him, to her absolutely, with other provisions made in case she should die first leaving surviving issue. Disposition was likewise made of the allotted interests in the event of any of the beneficiaries dying before sale and distribution. The power of revoking the trust was expressly reserved, but no form of revocation was prescribed.

Plaintiff pleaded his acceptance of the trust and the death of his father intestate; his inability to sell the land within the designated ten months, but his present ability to do so, provided he obtain an order of court so directing.

He also averred the consent of the beneficiaries to the proposed sale. The beneficiaries were made defendants. The court was asked to declare certain sums expended by the trustee to be charges upon the trust fund, to settle the trustee's account, fix his compensation, and decree a sale. Certain money claims of some of the beneficiaries against the property are asked to be determined and decreed invalid.

The defendant, Adeline Emery, answered, admitting that Walter E. Nichols did "make, execute, and deliver" the trust deed set out in the complaint, but denied that plaintiff accepted the trust or ever held the land in trust. She averred a revocation by the grantor of the deed of trust; that the property was, at the death of Walter E. Nichols, a part of his estate, and that she, as heir at law, was entitled to one-fourth part thereof. By cross-

complaint she pleaded ownership in herself of one-fourth of the property, and asked for a decree accordingly.

The defendant, Mary F. Foster, another daughter and beneficiary, and her husband, Fred A. Foster, answered, admitting the trust and its acceptance, and claimed under it; the husband averring that he had acquired the interest of William E. Nichols, a beneficiary and son ³²⁷ of the grantor, and that the beneficiary, James M. Nichols, was dead. William Nichols made default, and the action was dismissed as to James, who was found to be dead. The court found the execution and delivery to plaintiff of the deed of trust by Walter E. Nichols, and "that said Walter E. Nichols at no time made any other or further disposition of the land mentioned and described in the instrument."

It then found: "That it was not the intention of the said Walter E. Nichols when he executed the said instrument and delivered the same, nor of said Walter R. Nichols when he received the same, that said instrument should pass any immediate interest in said lands to said Walter R. Nichols, but it was intended that said Walter E. Nichols, the grantor in said deed, might use, possess, and occupy said lands and the products thereof during his life, and might make during his life any disposition of said lands that he might choose, other and different from that determined upon in the said instrument, and said Walter E. Nichols did, from the date of said instrument up to his death, use and occupy said lands and take to himself the entire product thereof.

"That no consideration ever passed to said Walter E. Nichols, grantor therein, for said instrument."

Due exception is taken to these findings.

The court concluded, as matter of law, that the instrument (the trust deed) is testamentary in character, and is to be judged by the laws of wills, and, so judged, that it is void for want of execution with the formalities prescribed for wills.

No express finding was made upon the issue of revocation of the trust, the court apparently deeming it unnecessary under its construction of the instrument. The only declaration touching the matter is the one above quoted, that the grantor never made other disposition of the lands.

A formal written acceptance of the trust over the signature of the trustee is embraced in the instrument, which was duly acknowledged by both grantor and ³²⁸ grantee, and recorded at request of the latter. It was pleaded and proved at the trial that the beneficiaries, as beneficiaries under the trust, had executed and acknowledged to plaintiff, as trustee under the trust, an

authorization to sell the property. No question of the invalidity of the trust is raised by the pleadings, the only claim in hostility to it being that presented by the averments of its nonacceptance and revocation. It is true that defendant, Adeline Emery, by cross-complaint, pleads ownership in fee of the undivided fourth part of the land, but nowhere in the pleadings or in the arguments of her counsel upon the trial, as disclosed by the record, is it even suggested that the trust instrument is void because testamentary in character.

The surprise which plaintiff urged as a ground for a new trial, seems, under the circumstances, to have been quite natural. The court reached its conclusion from its interpretation of the instrument by the light of the evidence in the case. That evidence is brief, consisting only of the testimony of the trustee, and it may be well to quote it. He says upon cross-examination:

"The deed of trust was executed at its date. I did not go into the actual possession of the property until after the death of W. E. Nichols, who occupied the premises from the date of the deed to the date of his death. He farmed the place and took all of its revenues. I took all of its revenues. I think he offered the property for sale; advertised it in a newspaper for sale. He paid the taxes on the land. They were assessed to him. I knew that the deed of trust gave to my father the right to revoke the trust. In speaking of this land, W. E. Nichols spoke of it as his own land. He had cultivated the crop that was on the place at the time of his death. A part of the crop was his. He leased part of the land."

At this point objection was made to "this testimony and this line of testimony." And the attorney for Mrs. Emery stating that he sought to show that the grantor had remained in possession of the land, and had not ³²⁹ recognized the trust, and that he would claim that the grantor had "acquired a right to the land by adverse possession," and that therefore he had filed his cross-complaint, the court, after discussion, sustained the objection.

Returning to the evidence, it is to be noted at a glance that its statements are, in some respects, contradictory and ambiguous. "He farmed the place and took all the revenues. I took all the revenues." "A part of the crop was his. He leased part of the land." Whether as lessor or lessee is not made plain. However, these matters need not further be considered, since, as has been said, there is no finding upon the question of the revocation of the trust, and since a settler, in the absence of fraud, mistake, or some similar ground of relief, cannot, by failing to

“recognize” the trust, or even by repudiation of it, affect the rights of the trustee and beneficiary vested under his deed.

The evidence must by the court have been considered as bearing upon the intent of the grantor in making the deed, and we proceed to review its decision in this regard. It is undoubtedly the general rule, enunciated by the leading case of *Habergham v. Vincent*, 2 Ves. Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death and passing no present interest.

The essential characteristic of an instrument testamentary in its nature is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights and divested himself of no modicum of his estate, and per contra no rights have accrued to and no estate has vested in any other person. The death of the maker establishes, for the first time, the character of the instrument. It at once ceases to be ambulatory, it acquires a fixed status and operates as a conveyance of ³³⁰ title. Its admission to probate is merely a judicial declaration of that status.

Upon the other hand, to the creation of a valid express trust, it is essential that some estate or interest should be conveyed to the trustee, and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately: *Perry on Trusts*, sec. 92. By such a trust, therefore, something of the settler's estate has passed from him and into the trustee for the benefit of the cestui, and this transfer of interest is a present one and in nowise dependent upon the settler's death. But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future and to depend for its commencement upon the termination of an existing life or lives or of an intermediate estate: *Civ. Code*, sec. 707.

Did the grantor in the present case divest himself by the instrument of any part of the estate in the land which he had formerly owned and enjoyed? By the terms of the instrument an estate was assuredly conveyed to the trustee. The language is appropriate to a conveyance, and the grantor's execution and delivery of the deed (both found), he being under no disability, and impelled by no fraud, operated to vest so much of his estate in the trustee as was necessary to carry out the purpose of the trust. The especial purpose was to sell and distribute the pro-

ceeds upon his death—a legal purpose authorized by section 857 of the Civil Code. The term of the duration of the trust, the life of the settler, did not violate the provisions of section 715 of the same code. We have, therefore, an estate conveyed to a named trustee for named beneficiaries, for a legal purpose and a legal term, such a trust as conforms in all its essentials to the statutory requirements. That no disposition is made by the trust of the interest and estate intervening in time and enjoyment between the dates of the deed and the death of the settler cannot affect the trust. The trustee takes the whole estate ³⁸¹ necessary for the purposes of the trust. All else remains in the grantor: Civ. Code, sec. 866. In this case there remained in the grantor the equivalent of a life estate during his own life, and he was thus entitled to remain in possession of the land, or lease it and retain the profits.

Nor did the fact that the settler reserved the power to revoke the trust operate to destroy it or change its character. He had the right to make the reservation (Civ. Code, sec. 2280), but the trust remained operative and absolute until the right was exercised in proper mode: *Stone v. Hackett*, 12 Gray, 232; *Van Cott v. Prentice*, 104 N. Y. 45. Indeed, this power of revocation was strongly favored in the case of voluntary settlements at common law, and such a trust, without such a reservation, was open to suspicion of undue advantage taken of the settler: *Lewin on Trusts*, *75, 76; *Perry on Trusts*, sec. 104.

We think, however, that the circumstances of the reservation of power to revoke, and the limitation of the trust upon the life of the settler, have operated to mislead the learned judge of the trial court. If the life selected had been that of a third person, and if no revocatory power had been reserved, no one would question but that a valid express trust had been created. But the fact that the designated life in being was the settler's could not operate to destroy its validity, for he had the right to select the life of any person as the measure of duration. And the fact that he reserved the right to revoke did not impair the trust, nor affect its character, since title and interest vested subject to divestiture only by revocation, and, if no revocation was made, they became absolute.

A man may desire to make disposition of his property in his lifetime to avoid administration of his estate after death. Indeed, in view of the fact, both patent and painful, that the fiercest and most expensive litigation, engendering the bitterest feelings, springs up over wills, such a desire is not unnatural. And when

it is ³³² given legal expression, as by gifts absolute during life, or by gifts in trust during life, or voluntary settlements, there is manifest, not only an absence of testamentary intent, but an absolute hostility to such intent.

The evidence above quoted does not militate against the establishment of the trust. At most it was addressed to showing an attempted revocation by the settler—a revocation, however, which the court does not find.

The deed being a voluntary settlement for the settler's children, and being fully executed, does not require other consideration for its support than that of parental affection and duty: *Lines v. Lines*, 142 Pa. St. 149; 24 Am. St. Rep. 487.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

Temple, J., and McFarland, J., concurred.

TRUSTS—POWER OF REVOCATION—EFFECT.—A reserved right of revocation is not inconsistent with the creation of a valid trust. If the right is not exercised during the lifetime of the grantor and according to the terms in which it is reserved, the validity of the trust remains as though there had never been reserved a right of revocation: *Lines v. Lines*, 142 Pa. St. 149; 24 Am. St. Rep. 487; *Dickerson's Appeal*, 115 Pa. St. 198; 2 Am. St. Rep. 547. To the same effect, see *Bristor v. Tasker*, 135 Pa. St. 110; 20 Am. St. Rep. 253, and note.

WILLS—WHAT ARE.—A will is an instrument by which a person makes a disposition of his property, to take effect after his death: *Barney v. Hayes*, 11 Mont. 571; 28 Am. St. Rep. 495, and note. An instrument disclosing the intention of the maker respecting the posthumous disposition of his property, and which does not operate until after his death, is a will, and may be revoked: *Hazleton v. Reed*, 46 Kan. 73; 26 Am. St. Rep. 86, and note.

TRUSTS, ESSENTIALS OF.—To the constitution of every express trust there must be a trustee, an estate to vest in him, and a beneficiary: *Greene v. Greene*, 125 N. Y. 506; 21 Am. St. Rep. 743.

MOLINEUX v. STATE.

[109 CALIFORNIA, 378.]

INTEREST—LIABILITY OF STATE.—The state is not liable for interest upon matured coupons of Indian war bonds issued under a statute which does not expressly subject it to such liability.

CONSTITUTIONAL LAW—RETROSPECTIVE STATUTE—LIABILITY OF STATE.—If a claim against the state does not bear interest when it accrues, a statute subsequently passed cannot impose a liability upon the state for interest thereon.

CONSTITUTIONAL LAW — GIFT OF INTEREST ON CLAIM.—A retrospective statute conferring a right to recover interest on a claim against the state, upon which no right to recover

interest exists prior to the enactment of such statute, creates a gift and is void, under a constitutional provision stipulating that the legislature shall have no power to make, or authorize the making of, any gift of any public money or thing of value to any individual or corporation. No moral obligation to pay such interest can make the statute constitutional, or make the interest so authorized other than a gift.

W. F. Fitzgerald, attorney general, for the appellant.

Mastick, Belcher & Mastick, and Freeman & Bates, for the respondent.

³⁷⁹ HARRISON, J. In 1851 certain Indian war bonds were issued on behalf of the state, by virtue of an act of the legislature, passed for that purpose: Stats. 1851, p. 520. The bonds themselves, and the coupons for the semi-annual interest thereon, which matured prior to 1854, were paid by the United States in September, 1856. Plaintiff is the holder of certain coupons that had been detached from these bonds, representing the semi-annual interest thereon that accrued prior to September 1, 1856, amounting in the aggregate to the sum of four thousand five hundred dollars. On the 3d of March, 1894, he presented his claim against the state upon these coupons to the board of examiners, and demanded that they allow the claim, with legal interest on the coupons from their respective dates of maturity. The board refused to allow his demand, and thereupon the present action was commenced, under the provisions of the act of February 28, 1893: Stats. 1893, p. 57. Judgment was rendered in favor of the plaintiff for the amount of the coupons and interest as claimed by him, from which the defendant has appealed, and the error chiefly relied upon in the appeal is the allowance of interest.

The liability of the state to pay interest upon the ³⁸⁰ matured coupons of its bonds was presented in *Sawyer v. Colgan*, 102 Cal. 283, and we there said:

"Section 1917 of the Civil Code does not apply to an indebtedness of the state, and the state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or some lawful contract of its executive officers: *United States v. North Carolina*, 136 U. S. 211; *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624." The respondent, however, contends that, under the provisions of section 5 of the act of 1893, under which this action is brought, he is entitled to legal interest upon the coupons from their maturity. That section is as follows:

"Sec. 5. In case judgment be rendered for the plaintiff in any

such suit, it shall be for the amount actually due from the state to the plaintiff, with legal interest thereon from the time the obligation accrued, and without costs."

The "legal interest" for which judgment is by this section authorized to be entered in favor of the plaintiff is only such interest as is authorized by law. If the plaintiff is not legally entitled to interest upon his claim, either by reason of the nature of the claim or the immunity of the state from an obligation to pay interest, this statute does not authorize its recovery; and, as we have seen that there was at that time no liability on the part of the state for interest upon the coupons, there was no "legal" interest for which a recovery could be had, irrespective of the provisions of the statute itself.

The claim by the respondent that the act is retrospective, and by its terms includes the right to recover legal interest from the maturity of the coupons, is met by article 4, section 31, of the constitution, which declares: "The legislature shall have no power . . . to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal, or other corporation whatever."

Inasmuch as prior to the passage of the act there was no liability for interest on the part of the state, it was ³⁸¹ not competent for the legislature to create such liability by the passage of the act. To increase the existing obligation for the coupons, by adding thereto the right to recover interest thereon, would be to make a donation to the holder of the coupons of the amount of the interest. If it be conceded that the state was under a moral obligation to pay the same interest upon its indebtedness that is recognized as recoverable by law between individuals, such moral obligation does not render the statute constitutional, or make the interest so authorized other than a gift: *Bourn v. Hart*, 93 Cal. 321; 27 Am. St. Rep. 203; *Conlin v. Board of Supervisors*, 99 Cal. 17; 37 Am. St. Rep. 17.

The superior court is directed to modify the judgment appealed from by striking therefrom the words "nineteen thousand six hundred and seventy-two dollars," and insert in lieu thereof the words "forty-five hundred dollars," and as so modified the judgment will stand affirmed.

Garoutte, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

INTEREST—STATES, WHETHER LIABLE FOR.—A sovereign is not bound to pay interest, unless it has expressly contracted to do so: *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624, and especially the

note thereto at page 648, where the cases affirming this doctrine are collected.

LEGISLATURE—POWER TO MAKE GIFTS OF PUBLIC MONEY.—The gifts which are forbidden by the constitution of California include all appropriations of public money for which there is no authority or enforceable claim, or which rest in some moral or equitable obligation. Public moneys must be regarded as held for public purposes, and the legislature is forbidden to dispose of them except for such purposes: *Conlin v. Board of Supervisors*, 99 Cal. 17; 37 Am. St. Rep. 17, and note. See, also, the extended note to *Carr v. State*, 22 Am. St. Rep. 638.

HIBERNIA SAVINGS AND LOAN SOCIETY v. THORNTON.

[109 CALIFORNIA, 427.]

MORTGAGE ON HOMESTEAD—RIGHT TO PERSONAL ACTION ON NOTE.—If a mortgage is executed by husband and wife upon a homestead, the mortgagee cannot bring an action and recover a personal judgment upon the mortgage note against the husband without foreclosure of the mortgage, on the ground that the mortgage lien is extinguished by failure of the mortgagee to present the claim against the estate of the deceased wife.

MORTGAGE UPON HOMESTEAD—DEATH OF SPOUSE—RIGHT TO FORECLOSE OR TAKE PERSONAL JUDGMENT.—If a mortgage is executed by husband and wife upon a homestead which is afterwards set apart to the surviving spouse, the mortgagee can neither maintain his action to foreclose, nor have a personal judgment against the survivor, unless he first presents his claim against the estate of the deceased spouse.

MORTGAGES—NEGLIGENCE OF MORTGAGEE—WAIVER OF SECURITY.—If a mortgagee, by his own act or neglect, deprives himself of the right to foreclose his mortgage, he at the same time deprives himself of a right to an action on the mortgage note. He cannot, without the consent of the mortgagor, release the mortgage, or waive the security for the purpose of bringing an action upon the note.

B. B. Newman, for the appellant.

Tobin & Tobin, for the respondent.

428 HARRISON, J. The defendant, Charles O'Neill, and his wife, Elizabeth, executed to the plaintiff their promissory note August 24, 1888, and, at the same time, for the purpose of securing its payment, executed a mortgage of certain real property upon which they had previously made a declaration of homestead. The property was the community property of the said Charles and Elizabeth at the time of filing their declaration of homestead, and remained such until the death of Elizabeth. Elizabeth died March 27, 1890, and administration was had upon her estate in the superior court for the city and county of San Francisco. The plaintiff did not present any claim against her estate upon the

note and mortgage, and on July 26, 1892, the superior court set apart the mortgaged premises to the defendant, Charles O'Neill, as the surviving husband. The present action is brought against Charles O'Neill upon the note alone, to recover judgment for its amount. The superior court held that, by reason of the failure of the plaintiff to present his claim to the administrator of the estate of Elizabeth, the mortgage lien was extinguished, by virtue of section 1475 of the Code of Civil Procedure, and rendered a personal judgment against the defendant for the amount of the note. The defendant has appealed from the judgment upon the judgment-roll, upon the ground that the findings do not support the judgment.

In *Barbieri v. Ramelli*, 84 Cal. 154, it was held that an action to recover a personal judgment upon a debt for which a mortgage security has been given, even ⁴²⁹ though such security was originally valueless, by reason of prior mortgages which exceeded the value of the lands, cannot be maintained; that if the mortgage on its face purports to be a security to the plaintiff, he must bring his action for its foreclosure: See, also, *Porter v. Muller*, 65 Cal. 512; *Hall v. Arnott*, 80 Cal. 348. In *Hearn v. Kennedy*, 85 Cal. 55, it was held that when a mortgage is made by husband and wife upon a homestead which is afterward set apart to the surviving widow, the mortgagee can neither maintain his action to foreclose the mortgage, nor have a personal judgment against the survivor, unless he first presents his claim against the estate under section 1475 of the Code of Civil Procedure.

It may be that, if the mortgagor's title to the land has become extinguished subsequent to the making of the mortgage, by title paramount, or if the mortgaged property has been destroyed, or has ceased to exist (see *Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 490), the mortgagee need not go through the idle form of bringing an action for foreclosure before he can have a judgment on the note; but when the mortgagee, by his own act or neglect, deprives himself of the right to foreclose the mortgage, he, at the same time, deprives himself of the right to an action upon the note. He will not be permitted, without the consent of the mortgagor, to release the mortgage for the purpose of bringing an action upon the note. "He is not authorized to waive the security and bring an action on the indebtedness": *Barbieri v. Ramelli*, 84 Cal. 154; and whether he release the security by some affirmative act or by his neglect is immaterial. In the present case, the plaintiff neglected to present its claim and have it allowed and paid out of the estate of the decedent. Whether, upon the facts as shown

in this case, this neglect had the effect to release the mortgage lien is immaterial. If it did have that effect, as it was the result of his own neglect, the plaintiff cannot rely upon such neglect as giving authority ⁴⁸⁰ to bring an action against the defendant upon the note alone. If it did not have that effect, the plaintiff should have brought his action to foreclose the mortgage.

The judgment is reversed.

Garoutte, J., and Van Fleet, J., concurred.

MORTGAGE—FORFEITURE OF RIGHT TO FORECLOSE—EFFECT.—If the holder of a mortgage secured by primary security forfeits his right to foreclose it, by permitting an adjudication which estops him from pursuing it, he is also estopped from enforcing the mortgage against secondary security held by him: *O'Brien v. Moffitt*, 133 Ind. 660; 36 Am. St. Rep. 566. A separate action cannot be brought for the recovery of a debt for which a mortgage security has been given: *Barbieri v. Ramelli*, 84 Cal. 154; *Porter v. Muller*, 65 Cal. 512.

HEIM v. BUTIN.

[109 CALIFORNIA, 500.]

MORTGAGES — FORECLOSURE — DEFICIENCY JUDGMENT—INJUNCTION.—If a mortgagor conveys the mortgaged premises to a third person, who agrees to pay the mortgage debt but fails to do so, an agreement between the original mortgagor and the mortgagee, that the latter is not to take any deficiency judgment against the former upon foreclosure, is without consideration, and the mortgagor who makes default in the foreclosure suit upon the faith of such agreement, but without having any legal defense, or suffering injury thereby, cannot enjoin the enforcement of a deficiency judgment rendered against him in violation of such agreement.

W. H. Jordan and W. A. Richardson, for the appellants.

W. E. McConnell and J. A. Barham, for the respondent.

501 BEATTY, C. J. This is an action to enjoin the defendant from enforcing a deficiency judgment docketed against the plaintiffs in a foreclosure suit, and the question to be decided is, whether the complaint states facts sufficient to constitute a cause of action.

It is alleged that in December, 1887, the plaintiffs, for a valuable consideration, made, executed, and delivered to the defendant their promissory note for four thousand nine hundred dollars, secured by mortgage; that they subsequently sold and conveyed the mortgaged premises to third parties, who assumed and agreed to pay the mortgage debt, but failed to do so; and that in Sep-

tember, 1891, the defendant, being requested by Ella ⁵⁰² M. Heim to foreclose, "did agree with her that he would commence an action for such foreclosure, and upon obtaining judgment in said cause, and a decree of said court directing the sale of said property to satisfy said judgment, he, this defendant, would at such sale purchase the same for the amount of such judgment obtained, including interest and costs at that time accrued, and he, the said defendant, did expressly agree with the said plaintiff that no personal judgment in said action should ever be entered or docketed against plaintiffs, or against either of them."

It is next alleged that thereafter, in September, 1891, the defendant commenced an action to foreclose said mortgage, and in January, 1892, obtained a decree for the sale of the mortgaged premises to satisfy the unpaid balance of the mortgage debt, amounting, with costs, etc., to about five thousand dollars; that the property was thereafter sold by the sheriff; that these plaintiffs, relying on the defendant's promise and agreement, failed to appear or answer in the foreclosure suit, though made parties thereto, and permitted their defaults to be entered therein, and afterward abstained from being present at the sale or taking any steps to obtain a purchaser for the mortgaged property so that their interests in the judgment might be protected and exonerated, and for the same reason they refrained from bidding at the sale, although fully able to purchase the property; that the defendant, in violation of his promise, bid less than the amount of the judgment and costs, and purchased the property for a sum which left a deficiency of nine hundred and eighteen dollars and forty-three cents, which he procured to be docketed as a personal judgment against these plaintiffs, and is threatening to enforce by execution. Wherefore plaintiffs pray that the enforcement of said personal judgment be perpetually enjoined, etc.

The defendant did not demur to the complaint, but answered, denying that he had ever made the promise or agreement alleged.

⁵⁰³ At the trial plaintiffs offered evidence tending to prove said agreement, but, upon objection of the defendant, the court excluded all such evidence, on the ground that the complaint was fatally defective for want of facts constituting a cause of action. Judgment of nonsuit followed, and plaintiffs appeal.

We think the ruling of the superior court was correct. The complaint not only fails to allege any consideration for the promise of defendant not to enter a deficiency judgment, but shows that there was no consideration. The defendant had a clear and

undoubted right to such a deficiency judgment, and the plaintiffs neither gave nor agreed to give or confer any benefit in consideration of its release, nor did they agree to suffer any prejudice or forego any advantage.

The promise of the defendant was, therefore, mere nudum pactum. But plaintiffs say they relied upon it, and acted upon it, and therefore the defendant is estopped from alleging or relying upon a want of consideration. This would be so if it appeared that their position was changed for the worse in consequence of their reliance on defendant's promise, but nothing to that effect is alleged. True, they suffered default, but they had no defense to the action, and they did not bid at the sale nor provide a bidder, but they do not allege that the property was worth a dollar more than it sold for, or that they would have been willing to bid more for it, or that anyone would have done so. In short, the complaint is fatally defective, and did not admit the proof of facts sufficient to warrant a judgment. The decision in *Thompson v. Laughlin*, 91 Cal. 317, does not conflict with this view. In that case, the plaintiff had waived his motion for a new trial in another action in consequence of the promise of the adverse party to satisfy the judgment, and, after the time for moving had passed, an attempt was made to enforce the judgment. The enforcement of the judgment was enjoined, but it was because, in the opinion of the court, the plaintiff ⁵⁰⁴ would have been entitled to a new trial if he had moved for it.

The judgment and order appealed from are affirmed.

Van Fleet, J., Garoutte, J., and Henshaw, J., concurred.

McFarland, J., dissented.

JUDGMENTS—RELIEF FROM IN EQUITY.—If, contrary to the agreement of counsel for both parties, judgment is entered, and the fact of its entry is concealed from the defendant by the joint misrepresentation of both the plaintiff and the justice until the time for appeal has expired, equity will grant relief by enjoining the assertion of such judgment: *Merriman v. Walton*, 105 Cal. 403; 45 Am. St. Rep. 50, and note. Equity will enjoin the enforcement of a judgment, if any fact exists which shows that it would be against conscience to execute the judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by the fraud of his adversary, unmixed with any fraud or negligence on his part: *Hibbard v. Eastman*, 47 N. H. 507; 93 Am. Dec. 467, and note. See, also, the note to *Hartford Ins. Co. v. Meyer*, 27 Am. St. Rep. 386, and the extended note to *Oliver v. Pray*, 19 Am. Dec. 603.

WEINSTOCK, LUBIN & Co. v. MARKS.

[109 CALIFORNIA, 529.]

TRADE NAME—FRAUDULENT INFRINGEMENT.—Although there can be no exclusive property in a trade name, it is a fraud on one who has established a trade and carried it on under a given name for some other person to assume the same name, or the same name with a slight alteration, in such manner as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to such name. Such fraud may be enjoined.

TRADE NAMES—INFRINGEMENT.—One who built up a business under the name of "Mechanics' Store" is entitled to an injunction restraining another from the use of the words "Mechanical Store" as a designation of his business for the purpose of deceiving the public, and especially the former's customers, and thereby securing the benefits of the goodwill of his business.

TRADE NAMES.—ANY SIMILARITY OF NAME likely to deceive or mislead an ordinary unsuspecting customer, and divert and secure his trade from the person who established a trade name, is a fraud which may be restrained by injunction.

TRADE NAME—INFRINGEMENT—INJUNCTION.—If one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the public by causing them to trade with him when they intended to trade, and would have otherwise traded, with his rival, he commits a fraud which may be restrained by injunction.

TRADE NAMES AND BUILDINGS—INFRINGEMENT.—When one has built up a particular business under a certain name in a house of a certain style of architecture, another engaged in a similar business, who adopts a similar name, and erects a building of precisely similar architecture, for the fraudulent purpose of drawing away the customers of the other by such deception, he may be restrained by mandatory injunction, and compelled to distinguish his place of business in some mode or form sufficient to indicate to the public that it is a different place of business from the other.

Holl & Dunn, for the appellant.

Johnson, Johnson & Johnson, for the respondent.

⁵³¹ GAROUTTE, J. Plaintiff is a corporation carrying on a large clothing and dry goods business in the city of Sacramento. Defendant is also a dealer in clothing of the same general character, and is carrying on business in a building adjoining plaintiff's place of business. The present action is one of injunction, and by its decree, among other things, the court ordered defendant to refrain from further use of the name "Mechanical Store" as the designation of his place of business, and further decreed that defendant maintain and place in a conspicuous part of his store, and also in a conspicuous ⁵³² place on the outside

or front thereof, a sign showing the proprietorship of his said store, in letters sufficiently large to be plainly observable by passers-by and customers entering therein. Defendant appeals from the foregoing portions of the judgment.

The judgment is based upon certain findings of fact made by the trial court upon the evidence offered at the trial, and no complaint is now heard that this evidence does not fully support those findings. It therefore follows that the merit of this appeal presents itself upon a consideration of those findings and the decree based thereon. These findings of fact are full and in detail, and for present purposes we deem it sufficient to state the general tenor and effect of some of them.

1. The court finds that, on or about the eighth day of October, 1874, H. Weinstock and D. Lubin entered into a copartnership under the firm name and style of Weinstock & Lubin of the city of Sacramento, and as such partners engaged in the business of dealing in wearing apparel for men, women, and children, and that said Weinstock & Lubin selected as the name of their place of business "Mechanics' Store," and designated the same by that appellation, by which name their said store thenceforth was continually known; that in the management and conduct of their business they fixed a price upon each and every article carried by them in the stock of said store, and marked the said prices in figures upon each article, and sold such articles at the prices so marked, and never deviated therefrom; and they advertised the said method of doing business extensively throughout the entire Pacific coast by means of newspapers, etc., by means whereof their said method of doing business became widely known to the trade and public throughout the entire Pacific coast, and by reason whereof it became and was well known to the trade and public in California and the other states and territories of the Pacific coast that at the store of said Weinstock & Lubin only one price was ⁵³³ charged for goods sold therein, and that no deviation from said price was permitted.

2. That by care, attention, skill, and strict adherence to business and the rules as aforesaid, this plaintiff has materially increased the volume and importance and value of said business, and enhanced the goodwill thereof, and the said plaintiff has established for the said store and business throughout the said states and territories a wide and honorable reputation, and thereby said business has become extensive and valuable and profitable, and the public have become accustomed to plaintiff's said method of doing business and have been induced to rely, and do rely, upon

the good faith of the plaintiff in managing and conducting his business in the manner aforesaid, and by reason thereof have been induced to bestow, and do bestow, upon the plaintiff their custom, trade, patronage, and business.

3. That on or about 1885 the defendant, who had previously been engaged in business elsewhere, and was without any established reputation of his own, and whose business was unknown to the trade and general public, removed his business from the place he then occupied to the premises on the east of and near the premises of this plaintiff, and the defendant then and there engaged in a similar line of trade as this plaintiff, and ever since then he has maintained and conducted, and still maintains and conducts, the said store at said place, and carries on the said business therein; and he named his store in the year 1887, or thereabouts, the "Mechanical Store."

4. That the defendant well knowing the foregoing facts, and contriving, intending, and designing fraudulently to injure this plaintiff, and to obtain undue advantage of plaintiff, and to deprive the plaintiff of its business, and fraudulently and unlawfully to increase his own business, and to pirate and make use of and appropriate to himself the goodwill of the plaintiff's business, and the said reputation and honorable esteem and confidence that the plaintiff enjoyed in the ⁵³⁴ minds of the people of the Pacific coast, and in order to create confusion in the public mind, and to take advantage of the standing that the plaintiff by its aforesaid acts had acquired in said territory, and fraudulently designing to deceive the public and people intending to trade with the plaintiff, and to divert the custom of the plaintiff to himself, and to deprive the plaintiff of its customers and of the trade, and to induce the people to trade with the defendant under the belief that they were trading with the plaintiff, and for the purpose of deceiving plaintiff's customers and persons intending to trade with plaintiff into believing that the defendant's store was that of the plaintiff, and thereby inducing them to enter said store of defendant to trade with said defendant, to his profit, and in order to carry out his fraudulent and corrupt designs as aforesaid, the defendant has persistently carried out a system of deceit and misrepresentations concerning his store and its ownership, in connection with plaintiff's store and business, as follows: That in 1891 plaintiff, at its place of business, erected a store, the front of which is of peculiar architecture, containing arches and alcoves, of which there was none other similar in the city of Sacramento; that afterward the defendant, at his said place of business, and

adjoining plaintiff's store, erected a building which, so far as the first or lower story is concerned, was and is similar in architecture in every respect to the store of plaintiff; so much so that passers-by were liable to go into the store of defendant thinking that they were entering the store of plaintiff, and that customers of plaintiff in many instances did so enter the store of defendant, thinking they were in the store of plaintiff. That defendant had no sign inside of his store or on the outside of his store by which customers could for themselves ascertain the true proprietorship thereof; that the erection of the defendant's building exactly the same as plaintiff's building in every particular, and the adoption of the use of the words "Mechanical Store," and the absence of any name or sign ⁵³⁵ upon or in defendant's store designating the true proprietorship of defendant's store, were all done by the defendant for the purpose of deceiving the public, and more especially plaintiff's customers, and enticing and pirating and securing the patronage of said customers from plaintiff to defendant.

5. That by the aforesaid means the defendant has diverted from the plaintiff a large part of plaintiff's trade and custom; has induced many persons to trade with the defendant who otherwise would have traded with the plaintiff; has sold large quantities of goods in said store to persons who, but for said acts of defendant, would have purchased said goods of the plaintiff; has deprived the plaintiff of a large share of its legitimate profits; has injured the business and reputation of the plaintiff; has impaired the confidence of the public in the plaintiff and its method of doing business, and has deprived the plaintiff of a large number of its customers and patrons.

The foregoing chapter of facts makes interesting reading, and we first turn our attention to that portion of the judgment restraining defendant from the further use of the words "Mechanical Store," as a designation of his place of business. We see but little difficulty in arriving at a conclusion upon this branch of the case. Defendant assails the judgment in this particular with but a single weapon. He insists that the words "Mechanics' Store" are not the subject of trademark, and that, therefore, plaintiff can have no exclusive right to them. As we view the picture presented by the findings of fact, the question as to what may or may not be the subject of trademark is not the problem to be solved. That these words are of a kind that may be used as a trade name we have no doubt, and, having established that fact, we are required to pursue the investigation no further. That certain names and designations which may not

become technical or specific trademarks may become the names of articles or of places of business, and thereby the use thereof receive ⁵³⁶ the protection of the law, cannot be doubted, for the cases everywhere recognize that fact. The learned judge said in *Lee v. Haley*, L. R. 5 Ch. App. 155: "I quite agree that they (the plaintiffs) have no property right in the name, but the principle upon which the cases on this subject proceed is not that there is property in the word, but that it is fraud on a person who has established a trade and carried it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." A similar doctrine is declared in *Glen etc. Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278, and also in the late case of *Coates v. Merrick Thread Co.*, 149 U. S. 562. This court said in *Pierce v. Guittard*, 68 Cal. 71, 58 Am. Rep. 1: "We are of opinion that it is not necessary to decide whether the plaintiff's label, with the accompanying words and devices, constituted a trademark, and as such the exclusive property of the plaintiff, for the reason that it is a fraud on a person who has established a business for his goods, and carries it on under a given name or with a particular mark, for some other person to assume the same name or mark, or the same with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with a person who has given a reputation to that name or mark." The same general principle is also recognized and approved in *Schmidt v. Brieg*, 100 Cal. 672. While in these two cases the fact appears that the defendants were selling an inferior article, and thereby deceiving and defrauding the public, it is not apparent that such fact was a necessary element in pointing the judgment. Neither do we consider it so upon principle, and in cases without number restraining defendants from trespassing upon the goodwill of plaintiff's business such fact was an element foreign to the litigation. It may be said that the adjudged cases for relief are based solely upon the ground of loss ⁵³⁷ and damage to the tradesman's business, by unlawful competition. In *Levy v. Walker*, *Cox's Trademark Cases*, No. 639, the learned judge declared: "The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything."

While our statutes attempt to deal with trade marks, and provide for the filing thereof with the secretary of state, with

accompanying affidavits, etc., yet trade names are equally protected, upon analogous principles of law. And that the words "Mechanics' Store" may be made a trade name, and the user thereof become entitled, under the law, to protection from pirates preying upon the sea of commercial trade, we have no doubt. We think the defendant should be restrained from the use of the words "Mechanical Store." The court has declared the fact to be, and it is not challenged by defendant, that these words were used as a designation of his store for the purpose of deceiving the public, and especially plaintiff's customers, and thereby securing the advantages and benefits of the goodwill of plaintiff's business. To say that such conduct upon the part of defendant is unfair business competition is to state the fact in the mildest terms.

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 97, Justice Bradley, of the supreme court of the United States, in speaking to the question of similarity in name, said: "It was not identical with the plaintiff's name. That would be too gross an invasion of the complainant's rights. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law." In this case, the trial court determined that there ⁵³⁸ was a sufficient similarity in the names to deceive the public; that the defendant adopted the name for the purpose of deceiving the public and securing plaintiff's business, and that such results had followed. These things being true, the decree must go against him.

The remaining branch of the case presents a novel and original proposition of law. In its facts we apprehend no case like it can be found, either in this country or England. The decree orders the defendant to place, both upon the outside and inside of his store, a sign, plainly legible to customers and passers-by, indicating his proprietorship. And while the power of the court to issue mandatory injunctions in many cases must be conceded, yet cases where such power has been exercised have generally involved matters of nuisance, or at least cases where courts have ordered the subject matter of the litigation to be placed in its original condition, as, for instance, the removing of obstructions to ancient lights.

But let us for a moment turn our attention to the facts of this case. The store of plaintiff was known as the "Mechanics' Store."

By various kinds of advertising, and attention, honesty, and skill in the conduct of the business, it increased the volume thereof and enhanced its goodwill, and throughout the Pacific Coast established for it a wide and honorable reputation as a fair and reliable house with which to deal. Plaintiff erected a store building of peculiar architecture, there being none like it in the city of Sacramento, and defendant thereupon erected a store building immediately adjoining that of plaintiff's, in every respect of similar architecture. It further appears that defendant erected this particular kind of building for the purpose of deceiving the public, and securing the patronage of plaintiff's customers; and for the same purpose he refrained from placing any sign in or upon the building indicating the proprietorship of the business, or designating it in any way so that it might be distinguished from the store of plaintiff. And, by reason of these acts of defendant, ⁵³⁹ many of plaintiff's customers were deceived into purchasing goods in defendant's store, believing that they were trading in plaintiff's store; and defendant thus diverted from the plaintiff a large part of its trade and custom, and thereby injured its business and curtailed the value of its goodwill. Upon this bald statement of facts, it cannot be gainsaid that defendant has done the plaintiff wrong, and it is said that for every wrong there is a remedy. These facts certainly indicate a case of unlawful business competition, and courts of equity have ever been ready to declare such things odious. 'Tis strange if plaintiff may be deprived of the fruits of a long course of honest and fair dealing in business by such wicked contrivances, and upon appeal to the courts for relief should be told there was no relief. This cannot be so, for the whole law of trademarks, trade names, etc., is recognized, approved, and enforced for the very purpose of protecting the honest tradesman from a like loss and damage to that which threatens this plaintiff; and the fact that the question comes to us in an entirely new guise, and that the schemer had concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him. It has been said by some judge or law-writer that "no fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and eluded by new schemes which the fertility of man's invention would contrive." By device defendant is defrauding plaintiff of its business. He is stealing its goodwill, a most valuable property, only

secured after years of honest dealing and large expenditures of money; and equity would be impotent, indeed, if it could contrive no remedy for such a wrong.

The fundamental principle underlying this entire branch of the law is, that no man has the right to sell his goods as the goods of a rival trader. Mr. Browne, in ⁵⁴⁰ his work upon Trademarks, declares the wrong to be, "Not in imitating a symbol, device, or fancy name, for any such act may not involve the slightest turpitude. The wrong consists in unfair means to obtain from a person the fruits of his own ingenuity or industry, an injustice that is in direct transgression of the Decalogue, 'Thou shalt not covet . . . anything that is thy neighbor's.' The most detestable kind of fraud underlies the filching of another's good name in connection with trafficking." We think the principle may be broadly stated, that when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed—a fraud which a court of equity will not allow to thrive.

In *Howard v. Henriques*, 3 Sand. 725, the court, in speaking of the competitor in business, said: "He must not, by any deceitful or other practice, impose on the public, and he must not, by dressing himself in another man's garments, and by assuming another man's name, endeavor to deprive that man of his own individuality, and of the gains to which, by his industry and skill, he is fairly entitled." It may well be said that the defendant, by duplicating plaintiff's building, with its peculiar architecture, and immediately adjoining, entering into the same line of business, with no mark of identification upon his store, has dressed himself in plaintiff's garments, and, having so dressed himself with a fraudulent intent, equity will exert itself to reach the fraud in some way. In the leading case of *Lee v. Haley*, L. R. 5 Ch. App. 155, the whole question is condensed, by the final conclusion of the court, into the principle of law "that it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead, and does lead, other people to suppose that his business is the business of another person." If the same evil results are accomplished ⁵⁴¹ by the acts practiced by this defendant which would be accomplished by an adoption of plaintiff's name, why should equity smile upon the one practice and frown upon the other? Upon what principle of law can a court of equity say, if

you cheat and defraud your competitor in business by taking his name, the court will give relief against you, but if you cheat and defraud him by assuming a disguise of a different character your acts are beyond the law? Equity will not concern itself about the means by which fraud is done. It is the results arising from the means, it is the fraud itself, with which it deals.

The foregoing principles of law do not apply alone to the protection of parties having trademarks and trade names. They reach away beyond that, and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent. In *Glenny v. Smith*, reported in 11 Jurist (1865), 965, the court held: "Where a tradesman, in addition to his own name upon his shop front, placed upon his sunblind and upon his brass plate the words 'From Thresher & Glenny' (in whose employment he had been), the court being of opinion that this was done in such a way as to be likely to mislead, and there being evidence that persons had been actually misled, granted an injunction to restrain such a use of the name of the firm 'Thresher & Glenny.'" In *Knott v. Morgan*, 2 Keen, 213, the "London Conveyance Company" had its omnibuses painted green and its servants clothed in the same colors. Another adopted the same name, and likewise its vehicles were so painted and its servants so clothed. It was conceded that plaintiff could have no exclusive property right in any of these things, but the court issued its injunction, declaring that plaintiff had "a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving ⁵⁴² them of the fair profits of their business by attracting custom on the false representation that carriages really the defendant's belong to and are under the management of the plaintiffs." The author, by a note, approves the doctrine here declared, saying: "There was an obvious attempt to trade upon the plaintiff's reputation, a constructive fraud, coupled with pecuniary loss, which was made the ground for the issuance of a broad injunction." The same principle is reiterated by the same learned judge in *Croft v. Day*, 7 Beav. 84, in the following words: "It has been very correctly said that the principle of these cases is this, that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right,

and thereby personate another person for the purpose of inducing the public to suppose either that he is that other person or that he is connected with and selling the manufacture of such other person while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud." In the very recent case of *Coats v. Merrick Thread Co.*, 149 U. S. 562, the court said: "There can be no question of the soundness of the plaintiff's proposition, that, irrespective of the technical question of trademark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser and induce him to believe he is buying those of the plaintiffs. . . . They have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals": To the same point see *Dr. Jaeger's Sanitary Co. v. Le Boutillier*, 24 N. Y. Supp. 890; *Apollinaris Co. v. Scherer*, 27 Fed. Rep. 18; *Burgess v. Burgess*, 3 De Gex, M. & G. 896; *Von Mumm v. Frash*, 56 Fed. Rep. 830.

Having decided that defendant's acts constitute a fraud upon plaintiff, and that a court of equity will administer ⁵⁴³ relief, the question then presents itself, What shall be the form of the decree? How may the court reach the wrong? The defendant had the right to erect his building, and erect it in any style of architecture his fancy might dictate. He had the right to erect it in the particular locality where it was erected. He had the right there to conduct a business similar to that of plaintiff. He had the right to do all these things, for, of themselves, they did not offend against equity; but when they were done with a fraudulent intent, when they were done for the purpose of tolling away the customers of plaintiff by a deception, a fraud is practiced, and equity will do what it can to right the wrong. The decision of the trial court in effect ordered defendant to place signs both inside and outside his building, showing to the world the proprietorship thereof. We think this decree holds defendant to a rule too strict, in that it requires the proprietorship of the store to be shown. In this particular we think the decree should be modified so as to require that the defendant in the conduct of this business shall distinguish his place of business from that in which the plaintiff is carrying on his business in some mode or form that it shall be a sufficient indication to the public that it is a different place of business from that of the plaintiff.

For the foregoing reason the judgment in this respect only is reversed, and the cause remanded with directions to the trial

court to modify the same as heretofore suggested, and thereupon it is ordered that said judgment stand affirmed. Appellant is to pay the costs of this appeal.

Harrison, J., and Van Fleet, J., concurred.

TRADE NAME—FRAUDULENT INFRINGEMENT.—AN INJUNCTION will issue to restrain the piracy of plaintiff's trademark, the distinguishing feature of which is used in combination with others to constitute a trademark or brand so similar in appearance as probably to deceive customers of plaintiff's business: *Listman Mill Co. v. William Listman Milling Co.*, 88 Wis. 334; 43 Am. St. Rep. 907, and note. An exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual, and it will be protected against infringement by another, who assumes it for the purpose of deception, or even when innocently used, without right, to the detriment of another: *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462; 43 Am. St. Rep. 769, and note.

PIONEER LAND COMPANY v. MADDUX.

[109 CALIFORNIA, 683.]

VOID JUDGMENT.—If, in an action by the state to foreclose a certificate of purchase of state land, the name of the holder of the certificate is alleged to be unknown, and he is sued under a fictitious name, the provisions of the statute for service of summons by posting must be substantially complied with, and if the return indorsed on the summons, and the record fail to show such compliance, the defects cannot be supplied by presumption, and a judgment by default foreclosing the certificate upon such return is void for want of jurisdiction.

PUBLIC LANDS—CERTIFICATE OF PURCHASE—RIGHTS OF HOLDER UPON PAYMENT.—The holder of a certificate of purchase of state land, who has fully paid the purchase price thereof, is the equitable owner of the land, with a vested right to a patent from the state. The state is then merely a naked trustee of the legal title, which it is bound to convey to such equitable owner on demand, and it has no right thereafter to sell and convey the land to another, even though it has obtained a void judgment foreclosing the certificate of purchase of such owner before he has fully paid the purchase price.

PUBLIC LANDS—TITLE OF HOLDER OF CERTIFICATE OF PURCHASE.—The holder of a certificate of purchase of state land who has fully paid the purchase price thereof, has a vested right to a patent and sufficient title to support an action to quiet title against a subsequent patentee from the state.

VOID JUDGMENTS—COLLATERAL ATTACK.—If a judgment is void, its validity is not affected by the denial of a motion to vacate it, made many years after its rendition, nor by the affirmance on appeal of the order denying the motion to vacate. Such affirmance is not conclusive of the validity of the judgment as against a collateral attack.

VOID JUDGMENTS.—Affirmance of a void judgment on appeal does not impart any validity to it, especially if it is affirmed on grounds not touching, but overlooking, its invalidity.

Daggett & Adams, for the appellant.

Lamberson & Middlecoff, for the respondents.

⁶³⁵ VANCLIEF, C. Action to quiet plaintiff's alleged title to forty acres of swamp land situate in the county of Tulare.

In 1856 Peter Goodhue applied to purchase the land in question from the state on a credit of five years, pursuant to section 5 of "An act to provide for the sale of swamp and overflowed lands belonging to this state" (approved April 28, 1855; Stats. 1855, p. 189), and thereupon such proceedings were regularly taken as entitled him to a certificate of purchase, under section 8 of said act, and such certificate was issued to him on May 30, 1856. Goodhue inclosed the land, and resided thereon until October 28, 1861, when he conveyed the same by deed, and delivered possession thereof to Marshall D. Young, who thence resided thereon and maintained the inclosure until February 1, 1864, when he conveyed the same ⁶³⁶ by deed, and delivered possession thereof to Samuel C. Young, who thence resided thereon and maintained the inclosure until May 10, 1870, when he, by deed, conveyed the same to Daniel Murphy, who then entered into possession of the land, kept it inclosed, and used it for grazing purposes until October, 1882, when he died testate. Thereafter, such proceedings were regularly taken in the matter of the estate of Daniel Murphy that the land in question was distributed by the superior court, according to the will, to Daniel M. Murphy and Diana Murphy Hill. On February 9, 1885, Daniel M. Murphy conveyed by deed all his interest in the land to Diana Murphy Hill, who, on June 2, 1887, conveyed the whole thereof to William Thomas, who, on June 3, 1887, conveyed the same to plaintiff.

Daniel Murphy, during his lifetime, and his executors and devisees thereafter until March 30, 1888, held possession of the land by a sufficient inclosure, and used it for pasturing livestock, and paid the taxes thereon for every year during all that time. The land was assessed to plaintiff in the spring of 1888, and plaintiff paid the taxes for that year. All the deeds above mentioned were duly recorded.

The defendants entered upon the land in June, 1888, claiming it to be unsold swamp land, and made application to purchase the same from the state, and procured from the state a certificate of purchase on February 1, 1892.

On October 28, 1892, this action was commenced and defendants filed their answer, claiming title by virtue of the last-mentioned certificate of purchase. On March 10, 1893, and before

the trial of this action, the state issued and delivered to defendant R. A. Maddux, a patent for the land, as alleged in a supplemental answer of the defendants, filed May 9, 1893.

A book in the office of the county treasurer introduced as evidence by the defendants, an extract from which is contained in the record, shows that the principal and interest of the purchase price (one dollar per ⁶³⁷ acre, with interest at ten per cent per annum) was fully paid by Peter Goodhue and his successors in interest as follows:

“Visalia, Tulare county, California, No. 33. Peter Goodhue’s survey of swamp land in town 21 south, range 27 east, section 25, Mount Diablo, containing forty acres. Surveyed March 25, 1856, S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 23. Filed May 30, 1856. 1857, In. \$4.00. July 18th received on the above \$4.00. 1859, May 31st, by one year’s interest, \$4.00. 1862, September 15th, by two years’ interest, \$8.00. 1864, October 24th, by principal and two years’ interest in full, \$48.00.”

Respondent contends, however, that the last item of this account (forty-eight dollars) was not paid until October 24, 1865; but in view of the ground, wholly independent of this, upon which I think the judgment should be reversed, it is immaterial whether the last payment was made on October 24, 1864, or on October 24, 1865, since it is admitted that the treasurer’s account is correct, except as to the date of the last item, and that the last item of forty-eight dollars was paid as early as October 24, 1865.

On the eighteenth day of May, 1865, the people of the state, by the district attorney of the county of Tulare, commenced an action against Peter Goodhue and John Doe to annul the certificate of purchase issued to Goodhue in 1856, pursuant to an act of the legislature approved April 9, 1861 (Stats. 1861, p. 140), authorizing the forfeiture and annulling of such certificates of purchase for nonpayment of interest or principal of the purchase price of lands sold by the state on a credit. It was averred in the complaint that “said defendant John Doe, whose true name is unknown to plaintiff, claims to be the holder of said certificate of purchase, and to have an interest in said land adverse to plaintiff. . . . That on the 16th day of November, 1864, there was remaining due plaintiff from defendant, and which had been due for more than thirty days, two years’ interest on said lands, to-wit: The sum of eight ⁶³⁸ dollars, . . . and said sum of interest still remains due and unpaid; . . . that defendant is delinquent as aforesaid, and has thereby forfeited all his right, title, claim, and interest in said lands.” At the

time this action to annul the certificate was commenced, and during the whole period of its pendency, Samuel C. Young was in possession of the land, claiming to own the same by virtue of his recorded deed from M. D. Young.

The only evidence of service of summons on the defendants is the return of the sheriff indorsed thereon as follows:

"Sheriff's Office,)
"Tulare County.)

"I hereby certify that I received the within summons on the 29th day of May, A. D. 1865, and personally served the same on Peter Goodhue, defendant therein named, by delivering to him a copy of said summons, attached to a certified copy of the complaint in said action, and also served the within summons on unknown owners sued under the fictitious name of John Doe, by posting a copy of the within summons in two public places in the township in which the real estate described in the complaint is situated, and one copy on the courthouse in Visalia, Tulare county.

"Dated July 29, 1865."

Section 2, page 140, of said act of April 9, 1861, provides: "If the name of the holder of the certificate of purchase be not known, he may be sued under a fictitious name, and service of summons may be had by posting one copy of the summons, containing a description of the land, for three weeks, at the courthouse door of the county, and two copies in public places in the township where the land is situate."

The judgment annulling the certificate, and declaring all rights of the defendant to the land forfeited, was taken by default, on October 30, 1865. It recites that the default of the defendants "for not appearing or answering has been duly entered"; but does not recite ⁶³⁹ that summons had been served in any manner on either of the defendants.

The court below found that the plaintiff was not the owner of any estate in the land described in his complaint, but that defendants were the owners thereof; and thereupon adjudged that plaintiff take nothing by this action. The plaintiff appeals from the judgment, and from an order denying his motion for a new trial. Counsel for appellant contends that the judgment purporting to annul the certificate is void, and that it so appears upon the face of the judgment-roll; and so it appears to me.

There was no service of summons on Samuel C. Young, who was the holder of the certificate and in possession of the land at the time the sheriff posted the copies of the summons, and who was sued by the fictitious name of John Doe. The deed of the

land to Samuel C. Young, which incidentally gave him a right to the certificate of purchase as a muniment or evidence of title (Jackson v. Hyde, 91 Cal. 463; Henderson v. Grammar, 66 Cal. 332), was duly recorded on June 18, 1864, and there is no suggestion or pretense that he was not personally known to the attorney for the state at the time he commenced the action, it being alleged only that his "true name" was unknown to plaintiff. Yet it is true that the statute (act of April 9, 1861, sec. 2) provides: "If the name of the holder of the certificate of purchase be not known, he may be sued under a fictitious name, and service of summons may be had by posting," etc. Assuming that, under the circumstances above stated, service of summons by merely posting copies thereof as directed by the statute was due process of law, surely a substantial compliance with that statute was necessary to effect such service. But while the judgment-rell shows what was done to effect service of summons, it fails to show a substantial compliance with the statute. The statute requires one copy of the summons to be posted for "three weeks at the courthouse door of the county, and two copies in public places in the township where the ⁶⁴⁰ land is situate"; but the return of the sheriff, indorsed on the summons, fails to show that any copy of the summons was posted "at the door" of the courthouse, or even on the courthouse "for three weeks," or for a single day; and also fails to show that two copies were posted in the township "for three weeks," or for any specific period of time. A posting of a copy "on the courthouse" elsewhere than "at the door," even for the period of three weeks, would have been a substantial and material departure from the requirement of the statute. The obvious reason for requiring it to be posted "at the door" was that it would more probably be seen and read at that point than at the rear, or on any other part of the courthouse. These defects in the return of the sheriff cannot be supplied or cured by presumption, although they might have been supplied by a recital of due service in the judgment. "Where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done; but when the record states what was done, it will not be presumed that something different was done. If the record merely shows that the summons was served on the son of the defendant, it will not be presumed that it was served on the defendant. If the affidavit of the printer shows that the summons was published one month, it will not be presumed that it was published three": Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Quivey v. Porter, 37 Cal. 462;

Hastings v. Cunningham, 39 Cal. 143. These cases have not been overruled in respect to the above quotation from **Hahn v. Kelly**, 34 Cal. 391; 94 Am. Dec. 742; **Estate of Newman**, 75 Cal. 213; 7 Am. St. Rep. 146. The following cases are also specifically in point: **People v. Greene**, 74 Cal. 400; 5 Am. St. Rep. 448; **Hyde v. Redding**, 74 Cal. 493; **People v. Mullan**, 65 Cal. 396.

The judgment purporting to annul the certificate of purchase to Goodhue being void, and the assignees of Goodhue having fully paid both principal and interest of the purchase price as early as October 24, 1865, if not ⁶⁴¹ a year earlier, it follows that the state had no beneficial interest in the land in 1888 when it issued a certificate of purchase to the defendant Maddux, nor in 1893 when it issued to him a patent; and, consequently, such patent to Maddux conveyed no title to him.

After the purchase price was fully paid by Goodhue and his assignees, the holder of the certificate of purchase, issued to him in 1856, was the owner of the land, the state being merely a naked trustee of the legal title, which it was and still is bound to convey to the equitable owner on demand; and, therefore, had no power to sell the land to another. A vested right to a patent from the state for public land is equivalent to a patent, so far as the state is concerned: **Stark v. Starrs**, 6 Wall. 402; **Wirth v. Branson**, 98 U. S. 118; **Benson Min. Co. v. Alta Min. Co.**, 145 U. S. 432; **Huff v. Doyle**, 93 U. S. 558; **Pratt v. Crane**, 58 Cal. 533; **McCabe v. Goodwin**, 106 Cal. 488. That plaintiff's title was sufficient to support this action against the defendants to quiet it is clear: **Pennie v. Hildreth**, 81 Cal. 130; **Orr v. Stewart**, 67 Cal. 275.

The only other matter to be considered arises from the following additional facts: In December, 1888, the plaintiff, as the successor in interest to Peter Goodhue and John Doe, who were the defendants in the action to annul the certificate of purchase, moved the court to set aside judgment in that case purporting to annul the certificate on the grounds: 1. That the court never obtained jurisdiction of the person of the defendant John Doe; and 2. That the purchase price of the land had been fully paid before the commencement of that action. The superior court denied the motion. The plaintiff herein appealed from the order denying it, and this court affirmed the order, on the ground of the great lapse of time between the date of the judgment and the making of the motion to set it aside, viz., twenty-three years. This court, by Mr. Justice Works, said: "We know of no pro-

vision of law which can be held to authorize the ⁶⁴² vacation of a judgment on a mere motion after so long a time": *People v. Goodhue*, 80 Cal. 199.

The respondent contends that this order denying plaintiff's motion to set the judgment aside, and the affirmance of it by this court, are conclusive of the validity of the judgment against the merely collateral attack made upon it in this case.

But no question as to the validity or regularity of the judgment was decided by this court. It was only decided that the judgment could not be reviewed on a mere motion after so long a time. If the judgment was void before the motion, neither the order denying the motion nor the affirmance of that order by this court imparted to the judgment any force or validity. It has been held that the affirmance by an appellate court of a void judgment imparts to it no validity; and especially if such affirmance is put upon grounds not touching its validity. I think Mr. Van Fleet, in his book "Collateral Attack," section 16, correctly states the law applicable to this case as follows:

"In order to make a judgment void collaterally, either 1. A legal organization of the tribunal; or 2. Jurisdiction over the subject matter; or 3. Jurisdiction over the person must be wanting; or 4. One or more of these matters must have been lost after it once existed. When either of these defects can be shown, the judgment and all rights and titles founded thereon are void, even in the hands of a bona fide purchaser. In such cases, the dignity of the court is of no concern. Thus, where a void judgment had been affirmed on appeal by the supreme court of Texas, the court said: 'The judgment of affirmance rendered by this court could not impart to it validity, but would itself be void by reason of the nullity of the judgment appealed from': *Chambers v. Hodges*, 23 Tex. 104, 110. The supreme court of Mississippi said that the affirmance of a void judgment on appeal, upon grounds not touching but overlooking its invalidity, did not make it valid: *Wilson v. Montgomery*, 14 Smedes & M. 205, 207. When a ⁶⁴³ judgment is lacking in any of the foregoing particulars, it matters not whether it was rendered by the highest or the lowest court in the land—it is equally worthless. No one is bound to obey it. The oath of all officers, executive, legislative, or judicial, compels them to disregard it. A few cases hold that want of jurisdiction over the person does not make the judgment of a superior court void (*Gay v. Smith*, 38 N. H. 171, 174; dictum in *Kimball v. Fisk*, 39 N. H. 110, 116; 75 Am. Dec. 213), but they are out of line, and wrong on principle.

I think the finding of the court that defendants owned the land in question is not justified by the evidence, and that the order and judgment appealed from should be reversed and the cause remanded for a new trial.

Haynes, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion, the order and judgment appealed from are reversed and a new trial granted.

Garoutte, J., Van Fleet, J., Harrison, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

APPEAL — AFFIRMANCE OF VOID JUDGMENT.—When a judgment sued on is affirmed on appeal, and the defendant submits himself to the jurisdiction of the appellate court, he cannot assail it, on the ground that the trial court never acquired jurisdiction of his person: *Roach v. Privett*, 90 Ala. 391; 24 Am. St. Rep. 819.

PUBLIC LANDS—CERTIFICATES—RIGHTS OF HOLDERS OF. A certificate of purchase from the United States land-office, issued prior to the patent, conveys the absolute title, and a patent subsequently acquired relates back to the date of said certificate: *Cavender v. Smith*, 3 G. Greene, 349; 56 Am. Dec. 541. See, also, the notes to the following cases: *Leveroni v. Miller*, 91 Am. Dec. 694; *Henry v. Welch*, 23 Am. Dec. 492; *Jackson v. Ramsay*, 15 Am. Dec. 254.

RECORDS—PRESUMPTIONS IN FAVOR OF.—Legal presumptions do not come to the aid of records, except as to acts or facts as to which the record is silent. Want of jurisdiction appears on the record whenever what was done is stated, and which, having been done, was not sufficient in law to give the court jurisdiction: *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742, and note.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

EISING v. ANDREWS.

[66 CONNECTICUT, 58.]

SURETYSHIP—LIABILITY OF PRINCIPAL.—If no cause of action exists against a principal on a bond, there can be none against the surety. Hence, if a cause of action for the breach of the condition of a bond, as for converting moneys received as a collector to the obligor's own use, is fraudulently concealed by the principal, so that in law it cannot be deemed to have accrued, as against him, until first discovered by the plaintiff and obligee, it cannot be deemed to have accrued before such discovery as against the surety.

LIMITATION OF ACTION.—The fraudulent concealment, by the principal on a bond, of a cause of action against himself, not only prevents the running of the statute of limitations in his favor, but it also stops the statute from running in favor of his surety.

Action on a bond given by the defendant's testator as surety. There was a judgment for the plaintiff, and the defendant appealed.

Howard B. Scott, for the appellant.

Lyman D. Brewster and John D. Perry, for the appellee.

¶ **ANDREWS, C. J.** The plaintiff is the only living partner of the late firm of E. Eising & Co. The defendant is the sole surviving executor of the will of Thomas F. Fay, late of Danbury, deceased. In his lifetime Fay had become obligated in a bond as surety for one Thomas F. Rowan, as principal, for which he bound himself, his heirs, executors, and administrators jointly and severally with the said Rowan, in the penal sum of two thousand dollars to the said E. Eising & Co., conditioned that the said Rowan, who had been employed by the said firm

as salesman and collector, "shall well and faithfully discharge his duties as such collector and ⁶² agent, and shall also account for all moneys, property, and other things which may come into his possession or control by reason of his appointment and employment as such agent and collector." Fay died on the twenty-fifth day of June, 1892. On the fifth day of July next thereafter, the court of probate for the district of Danbury limited and allowed six months from said date for the presentation of claims against his estate. After Fay's death, and between June 25, 1892, and August 26, 1893, Rowan received, as such collector and agent, from the customers of E. Eising & Co. more than two thousand dollars of money which belonged to the plaintiff, but which he appropriated to his own use—of which amount the sum of seven hundred and thirty-nine dollars and forty-one cents was misappropriated by Rowan after May 26, 1893. This defalcation of Rowan was by him fraudulently concealed from the plaintiff, and was not discovered by the plaintiff until the first day of September, 1893. He then made demand of Rowan that he should account for and pay over to the plaintiff the said amount which he had misappropriated, but Rowan has at all times neglected and refused so to do. He was then, and at all times since continues to be, wholly insolvent.

The plaintiff notified the defendant of such defalcation on the twenty-sixth day of September, 1893, and presented to him, as such executor, the claim of said partnership on said bond; and on the eighteenth day of November, 1893, made demand on him for the amount of the said bond, but the defendant refused to pay it. This suit was brought on the twenty-first day of November, 1893.

The defendant claimed, as matter of law, that upon these facts the plaintiff was barred by the statute of limitations from recovering in this action for any sums of money misappropriated by Rowan prior to May 26, 1893. And that the fraudulent concealment by Rowan of his misappropriation did not prevent the statute of limitations from running in favor of the defendant, nor postpone the time of the arising of the cause of action upon the bond until the plaintiff discovered the misappropriation. The court did not so hold, but rendered judgment for the plaintiff for the amount of ⁶³ the bond, with interest from the date of the demand. The defendant appealed to this court.

The bond on which this suit is brought contains two conditions: 1. That Rowan should faithfully discharge his duty as

agent and collector for the said copartnership; and 2. That he should account for all moneys, property, or other thing that should come into his hands, possession, or control, by reason of his employment as such agent and collector. A breach of each of these conditions is alleged in the complaint, and the facts found by the court show that each had been broken by Rowan.

Section 581 of the General Statutes—being a statute concerning the estates of deceased persons—provides that “when a right of action shall accrue after the death of the deceased, it shall be exhibited within four months after such right of action shall accrue”; and that, unless exhibited within such time, the creditor shall be forever debarred of all right to recover the claim.

The breach of the second condition named in the bond took place, and the right of action thereon accrued, not earlier than the 1st of September, 1893, and within four months next before the claim was exhibited to the defendant. The superior court might well have rendered its judgment entirely on the breach of that condition in the bond: *McKim v. Glover*, 161 Mass. 418. And there is nothing in the case to show that it did not. Counsel for the defendant does not dwell on this part of the case.

Under the statute above recited, the defendant admits that the plaintiff is entitled to recover the sum of seven hundred and thirty-nine dollars and forty-one cents, that being the amount of money misappropriated by Rowan within the four months next before the claim was exhibited to him. And he insists that because of that statute the plaintiff cannot recover for any moneys wrongfully appropriated by Rowan prior to the said four months. If that statute stood alone, it is more than likely that this action would never have been contested. It is another statute which causes the dispute. Section 1389 enacts that: “If any person, liable to an action by another, shall fraudulently ⁶⁴ conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against said person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence.” Applied to a cause of action, the term “to accrue” means to arrive; to commence; to come into existence; to become a present enforceable demand. And the true meaning of this statute is, that in cases to which it is applicable, the cause of action does not come into existence until it is discovered by the person entitled to sue thereon. The effect of this statute upon the present case is, that no cause of action came into existence by reason of Rowan’s defalcation until it was discovered by the plaintiff.

It is admitted by the defendant that this is the effect of the statute, if limited to Rowan himself. But the defendant says that the fraudulent concealment by Rowan does not prevent the accruing of a cause of action against him, the defendant. He says that fraudulent concealment of a cause of action prevents the running of the statute of limitations only in favor of the very party who commits the fraudulent concealment. He cites Wood on Limitations, second edition, page 139, and the cases there referred to as authority. Stated in somewhat different language, the claim of the defendant is, that although the accruing of a cause of action was, by reason of the last quoted statute, suspended, as against Rowan, until the defalcation was discovered, yet the accruing of a cause of action was not suspended against this defendant; that, as against him, this defendant, the cause of action arose when Rowan committed the defalcation; and, as it appears by the case, that all of the defalcation, except the sum of seven hundred and thirty-nine dollars and forty-one cents, was committed more than four months before the claim was exhibited to him, he cannot be made liable for that part.

It seems to us that there is a fallacy—or rather it is a fatal error—in this argument. It conflicts with the most essential feature of the law relating to surety and principal. The plaintiff seeks to recover damages on account of the defalcation of Rowan. The argument of the defendant ⁶⁵ assumes that a cause of action for such defalcation could exist against him before any cause of action therefor against Rowan had accrued. But the law relating to principal and surety forbids this. The rule is, that a cause of action cannot exist against a surety, as such, unless a cause of action exists against his principal. Ordinarily, the liability of such a surety is measured precisely by the liability of the principal: Brandt on Suretyship, sec. 121; Seaver v. Young, 16 Vt. 658; Boone County v. Jones, 54 Iowa, 709; 37 Am. Rep. 229; Patterson's Appeal, 48 Pa. St. 342; McCabe v. Raney, 32 Ind. 309. So long as no cause of action existed against Rowan, the principal, no cause of action existed against the defendant or his surety. And the statute of limitations does not begin to run in favor of any person, until there is a cause of action. The obligation of a surety is an obligation accessory to that of a principal debtor, and it is of the essence of this obligation that there should be a valid obligation of some principal. Thus, where one agrees to become responsible for another, the former incurs no obligation as surety, if no valid claim ever arises against the principal: Chitty on Contracts, 11th ed., 788. If the principal

is not holden, neither is the surety; for there can be no accessory if there is no principal: De Colyar on Principal and Surety, American ed., 39; Addison on Contracts, sec. 1111. The existence of a principal debtor is a condition precedent to the operation of the contract of a surety: Hazard v. Irwin, 18 Pick. 95; Swift v. Beers, 3 Denio, 70; Mountstephen v. Lakeman, L. R. 7 Q. B. 202; Mallet v. Bateman, L. R. 1 C. P. 163. This is only in accordance with the general law of contracts, which prevents a contract from becoming operative unless and until all conditions precedent are fulfilled: Brandt on Suretyship, sec. 214; Farmers' etc. Bank v. Kingsley, 2 Doug. (Mich.) 379. So, too, whatever discharges the principal debtor discharges the surety. The liability of a surety on a claim which is good as against the principal ceases as soon as the claim is extinguished against the principal. The nature of the undertaking of a surety is such that there can be no obligation on his part, unless there is an obligation on the part ^{of} of the principal. "It is correctly laid down, in Chitty on Contracts, that the contract of a surety is a collateral engagement for another, as distinguished from an original and direct agreement for the party's own act; and, as stated in Theobald on Principal and Surety, . . . it is a corollary, from the very definition of the contract of suretyship, that the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such a principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. Without a principal, there can be no accessory. Nor can the obligation of the surety, as such, exceed that of the principal. . . . It would be most unjust and incongruous to hold the surety liable, where the principal is not bound." Storrs, J., in Ferry v. Burchard, 21 Conn. 603. The same general doctrine is held in many other cases in this state: Willey v. Paulk, 6 Conn. 74; De Forest v. Strong, 8 Conn. 522; Bull v. Allen, 19 Conn. 101, 106; Glazier v. Douglass, 32 Conn. 393; Candee v. Skinner, 40 Conn. 464.

It follows, then, that the fraudulent concealment by Rowan, the principal, as it prevented the statute of limitations from running in his favor, also stopped it from running in favor of the defendant, his surety: Bradford v. McCormick, 71 Iowa, 129; Boone County v. Jones, 54 Iowa, 669; 37 Am. Rep. 229; Charles v. Haskins, 14 Iowa, 471; 83 Am. Dec. 378.

There is no error.

In this opinion the other judges concurred.

STATUTE OF LIMITATIONS—CONCEALMENT OF CAUSE OF ACTION.—If a party has been injured by the fraud of another, and such fraud is concealed, or is of such a character as to conceal itself, whereby the injured party remains in ignorance of it without fault or want of diligence on his part, the bar of the statute of limitations does not begin to run until the fraud is discovered, though there are no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party: *Wear v. Skinner*, 46 Md. 257; 24 Am. Rep. 517; note to *Chicago etc. Ry. Co. v. Titterington*, 31 Am. St. Rep. 47. The fraudulent concealment of a cause of action, to take it out of the operation of the statute of limitations, must be that of the party sought to be charged: *Wood v. Williams*, 142 Ill. 269; 34 Am. St. Rep. 79.

WARD v. METROPOLITAN LIFE INSURANCE COMPANY.

[66 CONNECTICUT, 227.]

NEW TRIAL.—Except in cases where no remedy can be had by appeal, it is bad practice to resort to motions for a new trial, under the provisions of chapter 51 of the Public Acts of Connecticut of 1893, which involve large expense to the state from the cost of printing the entire evidence, when the real grievance arises from the instructions which the jury received from the court. No verdict will, therefore, be treated, under the statute, as against the evidence in the cause, which is warranted, on the evidence, by the terms of the charge, however erroneous it may have been.

INSURANCE, LIFE—PAROL EVIDENCE—BREACH OF WARRANTY—PRESUMPTION.—If each statement in the application for a policy of insurance is warranted to be true, when, in fact, some of them are untrue, and the policy stipulates that it shall be void if any statement in the application is untrue, that the policy cannot be varied by any notice or representations not brought to the actual knowledge of one of the company's principal officers, and that there shall be no waiver not authorized by the company, parol evidence, in a suit upon the policy, after the death of the insured, of statements and representations made to and by the general and local agents of the company, for the purpose of showing a waiver of the breach of the warranty contained in the policy, and that the company is estopped from setting up such breach as a defense, is admissible to show such waiver and estoppel.

INSURANCE.—THERE IS NO PRESUMPTION that statements and representations, made to the general or local agents of an insurer, have been communicated to the home office of the company, or were known to the president or secretary thereof, when the policy issued.

NOTICE TO AGENT AS NOTICE TO PRINCIPAL.—If each statement in the application for a policy of life insurance is warranted to be true, when, in fact, some of them are untrue, provisions inserted in the policy, that it shall be void if any statement in the application is untrue, that it shall not be varied by any notice or representations, not brought to the actual knowledge of one of the company's principal officers, and that there shall be no waiver not authorized by the company, exclude the operation of the rule that notice to the agent who negotiates a contract is notice to the principal. Hence, in a suit on the policy, where the company sets up a

breach of warranty, it is error to instruct the jury that, if the local agent, when he forwarded the application to the home office with his approval, knew that material statements therein were false, and that if he, with such knowledge, collected and remitted the accruing premiums after the policy was issued, his knowledge was the knowledge of the company, and estopped it from setting up the breach of warranty.

INSURANCE, LIFE—BREACH OF WARRANTY—WANT OF NOTICE TO PRINCIPAL.—If each statement in the application for a policy of life insurance is warranted to be true, when, in fact, some of them are untrue, and the policy contains provisions that it shall not be varied by any notice or representations not brought to the actual knowledge of one of the company's principal officers, and that there shall be no waiver not authorized by the company, and suit is brought upon the policy, the defendant's request that the jury be instructed to return a verdict in its favor should be granted, if a plain breach of warranty has been proved, and there is no evidence that such breach was known to the president or secretary of the company until after the death of the insured.

EVIDENCE.—THE TERM "PRESUMPTION" is used to signify that which may be assumed without proof, or taken for granted.

PRINCIPAL AND AGENT.—THERE IS NO PRESUMPTION that the duties of a private agency have been faithfully performed.

INSURANCE, LIFE—ESTOPPEL.—A life insurance company cannot be estopped from setting up a breach of warranty that all statements in the application for insurance are true, unless it has waived its right to take advantage of it.

WAIVER—PRESUMPTION.—A waiver is an intentional relinquishment of a known right. A presumption of the relinquishment of a known right cannot be rested on a presumption that such right was known.

Action to recover the amount of a life insurance policy upon the life of John Ward. All accruing premiums had been paid to the local agents of the company. The application contained a warranty that the statements therein contained were true. The complaint alleged that the deceased and the plaintiff had duly fulfilled all conditions of the policy; but the answer set up facts showing a breach of warranty, and false statements in the application. The reply set up that the defendant, and its officers, and agents, from the time that the policy was issued down to the date of Ward's death, knew of the facts set up in the answer, and knew them when the premiums were collected. The plaintiff, therefore, claimed that the defendant had waived its right to insist on a forfeiture of the policy, and that it was estopped from claiming any of the matters set up in defense as a reason why the plaintiff should not recover. The reply was traversed by a rejoinder. The policy contained special clauses, the substance of which is given in the opinion. The insured, prior to his application, had met with a serious accident, occasioning a fracture of his ribs. On the trial, the plaintiff offered

evidence tending to show that all facts connected with the accident, the consequent fracture, and treatment by several physicians at the hospital, had been fully communicated by the insured and the plaintiff to Morrissey, the defendant's local agent at New Haven, and to Joseph Lefebure, the defendant's general agent for the district including New Haven, before the application was made out, and that the insured, when first solicited by Morrissey to take out the policy, had told him that he supposed he was not a proper subject for insurance, on account of such accident, and that he still felt sometimes a pain in his side as the result of it; but that Morrissey and Lefebure assured him that this made no difference, and were fully cognizant of the statements made in the application, and accepted his quarterly premiums as they fell due, with such knowledge, and forwarded them to the defendant company, by which the money had been retained. The defendant objected to the introduction of this evidence, but the court admitted it. The insured, in his application, had said nothing about this accident, but, on the contrary, had stated that he had never met with any accidental or personal injuries; that he had never been seriously ill, except with typhoid fever, twenty-four years before; that he had no usual medical attendant, and had never consulted any other medical man. No direct evidence was offered to show that any information as to the injury to the ribs of John Ward, or its effects, was ever received by any officer or agent of the defendant, other than Morrissey and Lefebure. There was a judgment for the plaintiff, Patrick W. Ward, and the defendant appealed, assigning error in the charge, and in the admission of parol evidence to establish a waiver or estoppel. There was also a motion for a new trial, under chapter 51 of the Public Acts of 1893, on the ground that the verdict was against the evidence.

Henry Stoddard and Samuel A. York, Jr., for the appellant.

Charles S. Hamilton, for the appellee.

237 BALDWIN, J. There clearly was evidence upon which the verdict can be supported, under the charge of the court. The act of 1893, chapter 51, page 228, was designed to afford a remedy only when none could be had by appeal: *Johnson v. Norton*, 64 Conn. 134; *Bissell v. Dickerson*, 64 Conn. 61, 71. The court feels bound to express its strong disapproval of a resort to motions of this character, involving large expense to the state from the cost of printing the entire evidence, when the real grievance arises from the instructions which the jury re-

ceived from the court. No verdict can be treated, under this statute, as against the evidence in the cause, which was warranted, on the evidence, by the terms of the charge, however erroneous such charge may have been.

Of the errors assigned upon the appeal, it is necessary to notice but three.

1. The policy in suit provides that, inasmuch as only the officers of the defendant at the home office have authority to determine whether a policy shall issue in any case, and as they act on the written statements made in the application, it is expressly agreed that no information, statements, or representations ²³⁸ made or given by or to its soliciting agents, or any other persons, shall in any manner affect its rights, unless put in writing and incorporated in the application; and also, that no agent has power to modify the contract, waive any forfeiture, or bind the company by receiving any representation or information, but that such power can be exercised only by the president or secretary of the company, and will not be delegated. It is further stated that each of the statements in the application, on which the policy was issued, is warranted to be true, and that if any of them is untrue, the policy shall be absolutely null and void.

It was not disputed (except in the pleadings) that certain statements in this application, of a material character, were untrue; but the plaintiff was allowed to introduce parol evidence of statements and representations made to and by the general and local agents of the defendant, for the purpose of showing that this breach of warranty had been waived, or that the company was estopped from setting it up as a defense. The objection to the reception of this evidence was properly overruled. It tended, so far as it went, to support the reply, which the defendant had traversed. The court could not know that it might not be followed up by further evidence that the information received by the agents had been communicated to the company, and was known to the president or secretary at the home office, when the policy was issued, in which case the plaintiff would clearly have shown himself entitled to a verdict.

No direct evidence of this nature was afterwards produced, but the jury were instructed in substance that its place might be supplied by a presumption that an agent receiving, as such, information which it is his duty to communicate to his principal, will so communicate it; that a presumption of honest conduct always exists, where no fraud or collusion is shown; and that fraud in any case is not to be presumed.

The term "presumption" is used to signify that which may be assumed without proof, or taken for granted: *Morford v. Peck*, 46 Conn. 380, 385. It is asserted as a self-evident result of human reason and experience. In its origin, ²³⁹ every presumption is one of fact, and not of law. It may, in course of time, become a presumption of law, and even an indisputable one. Its truth may be so universally accepted as to elevate it to the position of a maxim of jurisprudence. Its convenience, as a rule of decision, may be so generally recognized as to place it in the rank of legal fictions. But so long as it retains its original character as a presumption of fact, it has simply the force of an argument: 1 *Greenleaf on Evidence*, sec. 44; *Stephen's Digest of Evidence*, 246.

The presumption that public officers, in the discharge of their duties, have observed all proper formalities, may be now considered as one of law: *Booth v. Booth*, 7 Conn. 350, 367; *Coggill v. Botsford*, 29 Conn. 439, 447. But this cannot be said of the presumption that the duties of a private agency have been faithfully performed. The superior court properly admitted evidence of the knowledge of the defendant's agents at New Haven of the breach of warranty, but it erred in instructing the jury that, in determining its effect upon the question of estoppel, they might proceed, in the absence of countervailing proof, on the presumption that it was duly communicated to the home office. The plaintiff relies upon *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528, 538; but the objection there overruled was taken to the admission of the evidence, not to the charge to the jury. Under the instructions given in the case at bar, the jury were not told simply that they would be warranted in taking into consideration the presumption in question, but it was stated to them as an authoritative and binding rule, the only exceptions to which arose from fraud or collusion. It is true that their attention was also directed to the testimony of the defendant's officers that they were in fact never informed of the statements made to its agents; but this still left the burden of proof, as to the point of notice, on the wrong party. The difference between a presumption of fact and one of law, as these terms are commonly used, is that the former may be, the latter must be, regarded by the trier. The charge in the present case was calculated to make the jury suppose that they were bound in law to give some weight to each of the ²⁴⁰ presumptions to which reference was made. It also built a presumption of waiver upon a presumption of notice. This put it on too insecure a foundation. The defendant could not be estopped

from setting up a breach of warranty, unless it had waived its right to take advantage of it: *Insurance Co. v. Wolff*, 95 U. S. 326, 333. "A waiver is an intentional relinquishment of a known right." A presumption of the relinquishment of a known right cannot be rested on a presumption that such right was known: *First Nat. Bank v. Hartford etc. Ins. Co.*, 45 Conn. 25, 44; *United States v. Ross*, 92 U. S. 281, 283; *Manning v. Insurance Co.*, 100 U. S. 693, 699.

2. The superior court also erred in instructing the jury that if the district superintendent of the company at New Haven forwarded the application in question to the home office in good faith, with a recommendation of the risk, when he knew that material statements in the application were false, and, after the policy was issued, continued to collect the accrued premiums upon it and remit them to the defendant, then his knowledge was its knowledge, and its receipt and retention of the premiums estopped it from setting up the breach of warranty. There are expressions in the case of *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528, 539, which lend some countenance to the plaintiff's claims in this respect, but they were used with reference to a totally different question—that of the admissibility of evidence of the knowledge of the agent; nor did the policy there in suit contain any provisions similar to those in that of the plaintiff, as to oral statements which were not incorporated in the application.

The rule that the knowledge of an agent is the knowledge of the principal, if the agent acquired it while acting for the principal, in the course of the transaction which is in question, rests on the ground that the agent stands, for that transaction, in the place of the principal, and, in effect, is the principal, so far as concerns the rights of the other party: *Farmers' etc. Bank v. Payne*, 25 Conn. 444, 449, 450; 68 Am. Dec. 362. It is unimportant whether he in fact communicated his ²⁴¹ knowledge to the principal, because, even if he did not, it would be unfair to allow such a breach of duty on the agent's part to put the other party in a worse position: *Smith v. Board of Water Commrs.*, 38 Conn. 208, 218. There is no reason why a corporation, which necessarily contracts through agents, but may have agents of superior and agents of inferior authority, should not stipulate, in any contracts executed in its behalf, that their provisions can be varied by no notice or representations not brought to the actual knowledge of one of its principal officers, nor by any waiver not authorized by them: *Ryan v. World Life Ins. Co.*,

41 Conn. 168, 175; 19 Am. Rep. 490; Insurance Co. v. Wolff, 95 U. S. 326, 332. Provisions of that character were inserted in the policy in suit, and in the application upon which it was based. They were designed to exclude the operation of the rule that notice to the agent who negotiates a contract is notice to the principal; and such was their necessary effect.

3. The superior court was asked to direct the jury to return a verdict for the defendant. A plain breach of warranty had been proved. The plaintiff introduced evidence that it was known to and waived by the local agent and district superintendent of the company but none that it was ever known at its home office. The local agent and the person who was president of the company at the date of the application were dead, but the defendant produced the district superintendent, the vice-president, the secretary, and the general manager of the company, each of whom testified that he never knew that any of the statements in the application were untrue, until after the death of John Ward. Under these circumstances no verdict for the plaintiff could be supported, and there was nothing left to submit to the consideration of the jury, upon which their opinion could be of any importance in the determination of the cause. It might, as it has done, defer, but it could not avoid, the inevitable result. It therefore became the duty of the court, to the end that right and justice might be administered without denial or delay (Const., art. 1, sec. 12), to comply with the defendant's request and direct a verdict in its favor: *People's Sav. Bank v. Norwalk*, 56 Conn. 547, 556; *Talcott v. Meigs*, 64 Conn. 55, 58.

The motion for a new trial is denied; but upon the appeal there is error, and a new trial is ordered.

In this opinion the other judges concurred.

LIFE INSURANCE—WARRANTIES—FALSE ANSWERS.—If the insured, in his application for a policy of life insurance, makes unqualified statements, and stipulates that his policy is to be void if those statements are untrue, the policy is void if the answers are false: *Hartwell v. Alabama etc. Ins. Co.*, 33 La. Ann. 1353; 39 Am. Rep. 294; *Day v. Mutual Benefit etc. Ins. Co.*, 1 McAr. 41; 29 Am. Rep. 565, and note; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338; 16 Am. St. Rep. 893; notes to *Continental Life Ins. Co. v. Yung*, 3 Am. St. Rep. 635; *Hann v. National Union*, 97 Mich. 513; 37 Am. St. Rep. 372. Knowledge on the part of the agent of a life insurance company of the falsity of a warranty will not relieve the assured from a forfeiture of the policy: Note to *Continental Life Ins. Co. v. Yung*, 3 Am. St. Rep. 636. The distinction between warranties and representations is shown in a monographic note to *Continental Life Ins. Co. v. Rogers*, 59 Am. Rep. 816-822, discussing the subject.

When the local agent of an insurance company has actual knowledge of the falsity of an answer to a question in the application for insurance, which he writes for the insured, the knowledge of the agent will be imputed to the company, and it will not be allowed to avoid the policy on the ground of a false warranty in relation to such answer: *Follette v. Mutual Acc. Assn.*, 110 N. C. 377; 28 Am. St. Rep. 693. The agent's actual knowledge of the applicant's deafness, at the time of his application for insurance, and which fact was suppressed by him, is constructive notice to his principal, and constitutes a waiver of objection that the deafness was a bodily infirmity, although the policy provided that such agent should have no power to waive its conditions: *Follette v. United States etc. Assn.*, 107 N. C. 240; 22 Am. St. Rep. 878; but in the note to *Follette v. Mutual Acc. Association*, 28 Am. St. Rep. 696, it is said that the mere knowledge of an insurance agent, through whom the policy was procured, at the time the application was made, that answers therein written were false, will not prevent the company from setting up the breach as a defense to an action upon the policy. Waiver is an intentional relinquishment of a known right: *Perin v. Parker*, 126 Ill. 201; 9 Am. St. Rep. 571. Legal presumptions are rules established by common law or statute: *McCagg v. Heacock*, 34 Ill. 476; 85 Am. Dec. 327.

WHITING v. GAYLORD.

[66 CONNECTICUT, 337.]

PARTY WALLS—HOW CREATED.—In the absence of some statute, a strict party wall can exist only by prescription, or by contract, express or implied.

EASEMENTS—PRESCRIPTION.—To establish an easement, by prescription, of the right to have a building supported upon the land of another, it is absolutely essential that the user be adverse, and such as to give a right of action in favor of the party against whom it has been exercised.

EASEMENT, CONVEYANCE OF.—An easement, not expressly mentioned in a deed, does not pass, unless it naturally and necessarily belongs to the premises.

EASEMENT OF SUPPORT DEPENDS UPON WHAT.—The existence of an alleged easement, claimed to be annexed to one's land, to use the land of another for a special purpose, as to have a building supported thereon, depends, generally, on the question whether it is open, visible, continuous, and necessary.

EASEMENT OF SUPPORT ON ANOTHER'S LAND—PURCHASER IS NOT OBLIGED TO INSPECT PREMISES.—No easement of the right to have one's building supported upon the land of another, can be implied, unless there is an open and visible necessity therefor, essential to the enjoyment of the estate granted. Hence the purchaser, taking a deed without express mention of such easement, is under no obligation to make examination and inquiry to ascertain whether it exists.

EASEMENTS OR GRANTS NOT IMPLIED, WHEN.—Implied grants of land, or of easements, or of any interest in land, are allowed in Connecticut, to a very much more limited degree than in the other states.

Action by Fanny S. Whiting to recover damages for injuries to her half of a double wooden dwelling-house, and to her health,

alleged to have been caused by the defendant in and while tearing down his half of said house. The house stood on the south side of State street, in the city of Bridgeport. The plaintiff and defendant owned it, the plaintiff the west half and the defendant the east half, each in severalty. A division wall ran through the house from north to south. In the basement and up to the ground floor it was of brick, while above the ground floor it was of planks, lath, and plaster, and only about two and a half inches thick. The parties purchased of the same grantor, and the plaintiff's deed made the center of this wall his boundary on the east, and the defendant's deed made the center of this wall his boundary on the west. On each side of the wall a hallway about six feet wide separated the parlors on each side from the division wall. Each hallway was separated from the parlor on its side by a partition. Eight joists of the building ran from the partition west of the plaintiff's hallway, through the division wall to the partition east of the defendant's hallway, and were supported upon said partitions. They had been so supported ever since the house was built, more than twenty years. This method of the construction of said house was disclosed by an inspection of the premises, and inspection by the defendant before he purchased would have disclosed that construction to him. Shortly after the defendant became the owner of his part of the house, it being out of repair, he decided to rebuild, and did put up a new structure some ten or twelve feet nearer the street line. He did not disturb the division wall, but laid a brick wall entirely on his own land, leaving a space from two to nine inches in width between the new brick wall and the old division wall. When his house was finished he joined the new wall closely to the house of the plaintiff on either end and upon the roof, so that the space between the new wall and the old division wall was closed in from the outward air. In tearing down his portion of the building, the defendant cut off the joists about a foot within his division line, shored up the ends during the progress of the work until he could rest them upon the new brick wall, and, as fast as the new wall reached a sufficient height, he let the joists into it, by which they were finally supported. The planks of the old division wall were not so built as to fill the spaces between the joists, and, in taking down the building, these spaces were left open until the defendant covered them with tarred paper, which he did when the weather became cold. The work of tearing down and rebuilding was done without negligence, but, during its progress, the walls of

the plaintiff's house were badly cracked, and the doors were rendered incapable of being opened or closed, which effects were produced by the jarring of the timbers of the plaintiff's house, and the change of the wall caused by destroying the original support of the ends of the joists, and placing them on the new brick wall. The court held that the defendant, as an insurer, was liable to the plaintiff, for the damage so caused, although he was not negligent in the acts causing the damage. The plaintiff recovered a judgment for three hundred and fifty dollars, and costs, and the defendant appealed. The plaintiff suffered inconvenience and damage by reason of the cold, noise, dampness, and jarring, while the work of rebuilding was going on. The court adjudged that she was not entitled to recover for this damage, and she appealed.

Curtis Thompson, for the defendant.

J. C. Chamberlain and Nathaniel W. Bishop, for the plaintiff.

³⁴³ ANDREWS, C. J. The division wall, one-half of which was conveyed to the plaintiff by her deed, and the other half of which was conveyed to the defendant by his deed, has not been injured. It remains as it was before the defendant ³⁴³ rebuilt. No damages were claimed, and none were awarded, for anything done to it.

The defendant did certain acts on his own land, lawful in themselves, and without negligence. In doing such acts in that way some damage was unavoidably done to the plaintiff. The trial court held that the defendant was liable to the plaintiff for the damages so caused, as an insurer. The defendant insists that the trial court erred in so holding. It is to be observed that the finding does not, in terms, set out any relations existing between the plaintiff and the defendant, by reason of which he is subjected to the liabilities of an insurer and she entitled to the rights of one insured. If there is such a relation, it is to be gathered from the facts of the case.

It is found that the method of constructing this double dwelling-house would have been disclosed by an inspection, if the defendant had made one before he purchased. This finding can only mean that the method by which these joists were supported was not open, apparent, and visible. And that such means of support was not necessary to the maintenance of the plaintiff's house is shown by the fact that another means was readily substituted by the defendant.

The argument in this court in behalf of the plaintiff proceeds

on the theory that the plaintiff had an easement of support for the east end of the joists, which the defendant cut off upon the defendant's partition, although that partition was six feet from the division wall of the house; an easement of support precisely like, and to the same extent as, the easement for support which each of the owners of a strict party wall has in such a party wall; and that the defendant is liable to the plaintiff, as an insurer, for all the damages occasioned to her by reason of his interference with such support.

It has been held in some cases that where one owner of a party-wall makes any change in it for his own benefit, and when not required for the purposes of repair—he is absolutely responsible for all damage which is thereby occasioned ³⁴⁴ to the other owner: *Brooks v. Curtis*, 50 N. Y. 645; 10 Am. Rep. 545; *Schile v. Brokhahus*, 80 N. Y. 614; *Eno v. Del Vecchio*, 6 Duer, 17.

It is perhaps open to some doubt whether the rule of liability expressed in these cases would be applied to the same extent in this state. We have no occasion now to discuss that question. It would not be applied here or elsewhere, except in a case where a strict party wall was shown to exist. In the absence of some statute, a strict party wall can exist only by prescription, or by contract, express or implied: *Gilmore v. Driscoll*, 122 Mass. 207; 23 Am. Rep. 312; *Quinn v. Morse*, 130 Mass. 317; *List v. Hornbrook*, 2 W. Va. 340; *Bonomi v. Backhouse*, El. B. & E. 622; 9 H. L. Cas. 503. It is in these cases pointed out, that the right to the support of land—lateral and subjacent—in the means by which it is acquired, is entirely different from the right to have a building supported on the land of another. The former is in the nature of a right of property analogous to the flow of a stream of water, or of air, while the latter can only be founded upon a prescription, or on a grant express or implied: *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Partridge v. Scott*, 3 Mees. & W. 220.

But a right, by prescription, in the plaintiff to have these joists supported as on a party wall does not seem to be shown; nor is such right shown by any easement of less technical character. To establish an easement by prescription, it is absolutely essential that the use be adverse. It must be such as to give a right of action in favor of the party against whom it has been exercised: *Parker v. Hotchkiss*, 25 Conn. 321; *Gilmore v. Driscoll*, 122 Mass. 207; 23 Am. Rep. 312; *Sullivan v. Zeiner*, 98 Cal. 346; *Mitchell v. Mayor etc. of Rome*, 49 Ga. 25; 15 Am. Rep. 669.

While this house was owned as one house by the common

grantor of the parties, there was a unity of possession in the now dominant and servient estates; and the enjoyment of the quasi easement by each part of the house was in no sense adverse; and that period cannot be regarded as aiding to confer any right upon the plaintiff to its further enjoyment: *Hickox v. Parmelee*, 21 Conn. 98; *Manning v. Smith*, ³⁴⁵ 6 Conn. 289; *Tucker v. Jewett*, 11 Conn. 322; *Johnson v. Jordan*, 2 Met. 234; 37 Am. Dec. 85; *Hieatt v. Morris*, 10 Ohio St. 523; 78 Am. Dec. 280; *Tunstall v. Christian*, 80 Va. 1; 56 Am. Rep. 581; *Stanford v. Lyon*, 22 N. J. Eq. 33. Since she became the owner, sufficient time has not elapsed to raise a prescription.

There is no evidence, indeed there is no claim, of an express contract between this plaintiff and defendant, by which a party wall, or any easement of support, was established, or of any such contract by either of them with their grantor. So far as the deeds appear, the plaintiff took nothing but the land granted to her, that is, the land on the west side of and up to the center line of the division wall; while the defendant took all the land on the east side of that center line. Neither took any right in the land of the other. The plaintiff's title to the easement of support must, therefore, depend entirely on an implied grant. When a right or privilege is claimed as being annexed to one's land to use the adjacent land of another for a special purpose, whether arising from prescription (a prescription supposes a lost grant) or from an implied grant, or reservation, the existence of the alleged easement will, in general, depend upon an affirmative answer to the inquiry, Is it open, visible, continuous, and necessary? The purpose of the inquiry is to ascertain the intent of the grant. It is a matter of contract, and must depend upon the construction of the conveyance. And so the real question is, What construction will the law put upon a conveyance, where the intention of the parties in this respect is not expressed in terms?

The plaintiff contends that, as an inspection of the premises would have shown how the original house was constructed, it must be implied that she took her part of the house with the easement of support which she now claims, and that the defendant took his part of the house subject to such easement in her favor. The finding does not indicate what is intended by the expression "an inspection." An inspection may be very general, or it may be very minute. It may be made by one having no skill, or it may be made by one having great skill. The claim of the plaintiff's counsel ³⁴⁶ indicates that they mean a careful

inspection by a person who is reasonably familiar with the premises.

The leading case cited by the plaintiff, and indeed the only one we have found which goes far enough to fully support her claims, is *Pyer v. Carter*, 1 Hurl. & N. 916. In that case, the owner of a single house converted it into two houses. While he was the sole owner, he had constructed a drain under both of them. He sold one of them to the defendant, and afterwards the other one to the plaintiff. The defendant stopped the drain, so that the water from the plaintiff's house could not flow off. It was not proved that at the time of the purchase the defendant knew of the position of the drain. Judgment was given for the plaintiff. In deciding the case, the court of exchequer said the defendant took his part of the house, "such as it is," subject to all the apparent signs of servitude which existed; and that by "apparent signs" must be understood, not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject." This case was decided in 1857. But it has since been repeatedly and distinctly disapproved in England.

In *Suffield v. Brown*, 4 De Gex, J. & S. 185, decided in 1864, in the court of chancery, Lord Chancellor Westbury, in respect to *Pyer v. Carter*, 1 Hurl. & N. 916, after stating the case, said: "It was held that the second purchaser was entitled to the ownership of the drain, that is, to a right over the freehold of the first purchaser, because, said the learned judges, the first purchaser takes the house, 'such as it is.' But, with great respect, the expression is erroneous, and shows the mistaken view of the matter; for, in a question, as this was, between the purchaser and the subsequent grantee of his vendor, the purchaser takes the house, not 'such as it is,' but such as it is described and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance, in *Pyer v. Carter*, 1 Hurl. & N. 916, were quite inconsistent with the notion of any right or interest remaining in the vendor. It was said by the court that the easement was 'apparent,'³⁴⁷ because the purchaser might have found it out by inquiry; but the previous question is whether he is under any obligation to make inquiry, or would be affected by the result of it; which, having regard to his contract and conveyance, he certainly would not. Under the circumstances of the case of *Pyer v. Carter*, 1 Hurl. & N. 916, the true construction was, that as between the purchaser and the vendor, the former had the right to stop and block up the drain where it en-

tered his premises, and that he had the same right against the vendor's grantee. I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority." In another part of the opinion, the Lord Chancellor said: "When the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end, by contract, to the relation which he had himself created between the tenement sold and the adjoining tenement; and discharges the tenement so sold from any burden imposed upon it during his joint occupancy; and the condition of such tenement is thenceforth determined by the contract of alienation, and not by the previous user of the vendor during such joint ownership. . . . It seems to me more reasonable and just to hold that, if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant . . . by the fiction of an implied reservation. If this plain rule be adhered to, men will know what they have to trust, and will place confidence in the language of their contracts and assurances." In *Crossley v. Lightowler*, L. R. 2 Ch. App. 478, decided in 1867, Lord Chelmsford said, in respect to the case of *Pyer v. Carter*, 1 Hurl. & N. 916, "Lord Westbury, however, in the case of *Suffield v. Brown*, 4 De Gex, J. & S. 185, refused to accept the case of *Pyer v. Carter*, 1 Hurl. & N. 916, as an authority," and added: "I entirely agree with the view. It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for non constat that the grantor does not intend to relinquish it, unless he shows the contrary by expressly reserving it": See, also, *Wheeldon v. Burrows*, L. R. 12 Ch. Div. 31. Other English cases are, ³⁴⁸ *Russell v. Harford*, L. R. 2 Eq. 507; *Morland v. Cook*, L. R. 6 Eq. 252; *Davies v. Sears*, L. R. 7 Eq. 427; *Brown v. Alabaster*, L. R. 37 Ch. Div. 490.

The cases in this country which have referred to *Pyer v. Carter*, 1 Hurl. & N. 916, have none of them, so far as we can learn, ever followed it to its full extent. The American cases have, with almost entire unanimity, limited easements by implied grant to such as were open, visible—such as would be apparent to an ordinary observer—continuous, and necessary to the enjoyment of the estate granted or retained: *Carbrey v. Willis*, 7 Allen, 364; 83 Am. Dec. 688; *Randall v. McLaughlin*, 10 Allen, 366; *Philbrick v. Ewing*, 97 Mass. 133; *Lampman v. Milks*, 21 N. Y. 505; *Butterworth v. Crawford*, 46 N. Y. 349; 7 Am. Rep. 352; *Henry v. Koch*, 80 Ky. 394; 44 Am. Rep. 484; *Evans v.*

Dana, 7 R. I. 306; Providence Tool Co. v. Corliss Steam Engine Co., 9 R. I. 564; Dunklee v. Wilton R. R. Co., 24 N. H. 489; Warren v. Blake, 54 Me. 276; 89 Am. Dec. 748; Janes v. Jenkins, 34 Md. 1; 6 Am. Rep. 300; Ingals v. Plamondon, 75 Ill. 118; Feters v. Humphreys, 18 N. J. Eq. 263; 19 N. J. Eq. 471; Denton v. Leddell, 23 N. J. Eq. 67; Parsons v. Johnson, 68 N. Y. 62; 23 Am. Rep. 149; Griffiths v. Morrison, 106 N. Y. 165; Root v. Wadhams, 107 N. Y. 384.

These cases differ considerably as to the degree of necessity which must exist in order to raise the implication that the easement, or quasi easement, passes; but they all concur in the rule just stated, that it must be one which is open, visible, and necessary.

In this state the rule of construction, settled by a series of decisions, is, that the subject matter of a deed is to be ascertained from its premises, and that by a deed of land, described as such, nothing passes except what is fairly included in the premises, that an easement not naturally and necessarily belonging to the premises will not pass. In *Manning v. Smith*, 6 Conn. 289, a grantor conveyed land upon which ended a pipe carrying water from a spring upon land reserved by him in the deed; the words "to have and to hold the premises, with all their appurtenances," followed the description of the land. The grantee insisted that he had by these words acquired the right to have the water flow to this land. ³⁴⁹ This claim was denied. The court said: "It is insisted, that the deed . . . conveyed the easement in question. The words of the deed describe only the land; it is added, 'to have and to hold the premises, with all their appurtenances.' . . . The deed . . . did not convey any right to the easement, unless it belonged, naturally and necessarily, to the premises. If the conduit had been placed there a month previously, by a stranger, or by the defendant, it would hardly be said that it was a part of the freehold. It would not be strictly necessary to its enjoyment: *Coke on Littleton*, 121 b, 122 a. 'By the grant of a messuage with the appurtenances, a shop annexed to it for thirty years does not pass, unless it be found to be a part of the messuage': *Bryan v. Wetherhead*, Cro. Car. 17. The subject matter of the grant in the deed is the land, and that does not include the easement, as we have seen. Can, then, the thing granted be enlarged, by the words 'to have and to hold with the appurtenances'? It is in the premises of the deed that the thing is really granted: 3 Cruise's Digest, sec. 51, p. 47; *The Abbess of Sion*, 33 Hen. 6, 33, cited in *Hob.* 161;

Needler v. Bishop of Winchester, Hob. 231; Whalley v. Thompson, 1 Bos. & P. 371; Grant v. Chase, 17 Mass. 443; 9 Am. Dec. 161. It is the office of the habendum sometimes to enlarge the estate granted, but never the subject matter of the grant. . . . The plaintiff, grantee of the defendant, by the deed, might have secured to himself this privilege, by express grant, or by covenants. He has taken his deed; and it is not for the court to give it a construction not authorized by law." This case of Manning v. Smith, 6 Conn. 289, is cited with approval in Miller v. Scolfield, 12 Conn. 343, in Giddings v. Emerson, 24 Conn. 546, and in Williams v. Wadsworth, 51 Conn. 308. See, also, Sheppard's Touchstone, 89; 3 Cruise's Digest, sec. 51.

Implied grants of land, or of easements, or of any interest in land, are allowed here, when allowed at all, to a very much more limited degree than in the other states. These decisions are in accordance with what has always been the policy of our recording system, that the title to all interests in land shall appear on the land records, so that they may ³⁵⁰ be easily and accurately traced: 1 Swift's Digest, 122; North v. Belden, 13 Conn. 380; 35 Am. Dec. 83; Herman v. Deming, 44 Conn. 124; Cake v. Peet, 49 Conn. 501; Salisbury Sav. Soc. v. Cutting, 50 Conn. 113. We think this plain policy should be adhered to, so that men will know what they have to trust, and can place confidence in the language of all conveyances as they find them recorded. And inasmuch as the easement of support which the plaintiff claims was not an open and visible one, and, although convenient, was not necessary to the enjoyment of her part of the house, we think she has shown no title to it, and that she cannot recover.

There is error on the defendant's appeal, and no error on the plaintiff's appeal.

In this opinion the other judges concurred.

PARTY WALLS.—A party wall is created as such in three ways only: By contract, actual or presumptive, from long user between the adjoining owners, by statute, or by grant from the original owner of two lots, who erects a party wall between them and afterward conveys them to different grantees: See monographic note to Bloch v. Isham, 92 Am. Dec. 289, on the law of party walls. The user of party walls for more than twenty years raises a presumption of a grant: Dowling v. Hennings, 20 Md. 179; 83 Am. Dec. 545, and note. One may acquire a prescriptive right to use a party wall in the manner in which he has enjoyed it: Putzel v. Drovers' etc. Nat. Bank, 78 Md. 349; 44 Am. St. Rep. 298. Conveyances of adjoining buildings having a party wall, to different grantees, the center line of the wall being made the boundary between them, give to each grantee a right to have his building supported by means of his neighbor's half of the wall: Partridge v. Gilbert, 15 N. Y. 601; 69 Am. Dec. 632. And if either building becomes,

by age and decay, so dilapidated that rebuilding becomes necessary, its owner may, for that purpose, and on reasonable notice to the adjoining tenant, and using proper care and skill, take down and rebuild the party wall, without incurring liability to the other tenant: *Partridge v. Gilbert*, 15 N. Y. 601; 69 Am. Dec. 632; *Putzel v. Drovers' etc. Nat. Bank*, 78 Md. 349; 44 Am. St. Rep. 298; monographic note to *Bloch v. Isham*, 92 Am. Dec. 293, on the law of party walls, showing at page 292, that the easement of support is the only proper easement incident to a party wall.

EASEMENT—CONVEYANCE.—An easement, where it is not expressly described in the conveyance, must actually belong to the estate conveyed in order to pass by implication, and grants by implication are limited to cases of strict necessity: See monographic note to *Green v. Collins*, 40 Am. Rep. 538, 539, on conveyance of easement by implication; monographic note to *Strickler v. Todd*, 13 Am. Dec. 659, on what passes as appurtenant: *Bonelli v. Blakemore*, 66 Miss. 136; 14 Am. St. Rep. 550. The easement, to pass as such by implied grant, must also be continuous, permanent, and apparent: See *Bonelli v. Blakemore*, 66 Miss. 136; 14 Am. St. Rep. 550, and monographic note to *Elliott v. Rhett*, 57 Am. Dec. 759–768, on implied grant of apparent and continuous easements on conveying part of heritage, showing that if the owner of two adjacent lots builds a house on each, with a division wall resting partly on each lot or wholly on one, and then sells and conveys both by metes and bounds, the purchaser of the lot on which the wall does not rest in whole or in part has an easement, for support, by implication, in the wall, so far as it rests on the other lot, such easement being regarded as apparent, continuous, and necessary. An easement in the land of another can be acquired by adverse user only with the acquiescence of the owner of the land in its exercise under a claim of right. From such a use of an easement for twenty years the law will presume a nonappearing grant: *Powell v. Bagg*, 8 Gray, 441; 69 Am. Dec. 262; *Pitzman v. Boyce*, 111 Mo. 387; 33 Am. St. Rep. 536. It has been held that, where a house is converted into two, and sold to different persons, and there is but a single drain, there passes by implication to the subsequent purchaser the right to use it. Here, although the defendant was ignorant of the drain at his purchase, it was held that he must or ought to have known that some drain existed; that he was put on inquiry, and inquiry would have disclosed the existence of the drain: Note to *Green v. Collins*, 40 Am. Rep. 538.

PITTS v. HARTFORD LIFE AND ANNUITY INS. CO.

[66 CONNECTICUT, 876.]

INSURANCE, LIFE—PAYMENTS PREVENTED BY INSANITY OF THE ASSURED.—If a person, by express contract, engages absolutely to do an act not impossible or unlawful at the time, neither inevitable accident, nor other unforeseen contingency not within his control, will excuse him. Hence, if a member of an assessment insurance company promises to pay certain mortuary assessments, and a stated sum annually for expenses, within thirty days after notice that the same is due; payment by the insured of the stipulated sums as they become due is a condition precedent to any subsequent liability on the part of the company, though the mental faculties of the insured, at the time of receiving notice of a mortuary assessment, are so far impaired as to prevent him from doing business.

LIFE INSURANCE—WHEN TIME IS OF ESSENCE OF CONTRACT TO MAKE PAYMENTS.—If a certificate of member-

ship in an assessment insurance company provides that the insured shall make certain payments when due; that the certificate shall be null and void if the payments are not so made; and that all moneys paid thereon shall be forfeited to the company in case of neglect to make any required payment, the time of payment is of the very essence of the contract, and nonpayment, when the money is due, involves absolute forfeiture, and releases the company from liability without any affirmative action on its part.

EVIDENCE—PRESUMPTION AS TO RECEIPT OF LETTER.—The presumption is, that a notice by letter given to an insured person, addressed to the place where he resided and usually received his letters, was received in the due course of mail, especially where the notice was subsequently found in the possession of the person to whom it was addressed.

LIFE INSURANCE—NOTICE OF ASSESSMENT, VALIDITY OF.—A notice of a mortuary assessment, sent to a member of an assessment insurance company, is not rendered defective by the fact that it includes an item for three months' expenses in advance, which the insured had for seven years elected to pay quarterly, rather than monthly.

Action to recover the amount of a policy of life insurance. The case was reserved, upon the facts found, for the consideration and advice of the appellate court.

William F. Henney and Arthur L. Shipman, for the plaintiff.

Theodore M. Maltbie, for the defendant.

379 **ANDREWS, C. J.** The plaintiff is the beneficiary named in a certificate of membership, or policy, issued by the defendant in its safety fund department, on the life of Thomas D. Pitts, her husband. Thomas D. Pitts died on the eighteenth day of May, 1891, and this suit was brought to recover the amount named in the said certificate of membership, which certificate provided: "That upon the death of the member aforesaid while this certificate is in force, all the conditions hereof having been conformed to by said member, and upon receipt by the president or secretary of said company of satisfactory proofs of such death, an assessment shall be made upon the holders of all certificates in force in said department at the date of such death, according to the table of graduated assessment rates, given hereon, as determined by their respective ages and the number of such certificates in force at the date of such death, and the sum collected thereon (less ten cents per each member assessed for cost of collection) shall be paid—provided, however, that in no case shall the payment upon this certificate in the event of such death exceed one thousand dollars— . . . to his wife, Fittie L. Pitts, if living, otherwise to his legal representatives within 380 ninety days after the receipt of such proofs, upon presentation and surrender of this certificate."

It was admitted that the defendant issued to said Thomas D. Pitts such a certificate as the plaintiff claimed, and that the said Thomas D. died on the day named, from a cause not therein excepted, and that due proofs of his death had been furnished to the defendant.

The defendant claimed that the said certificate had lapsed and become void, by the neglect and refusal of the said Thomas D. to perform the conditions and make the payments therein required to be performed and paid.

It is found by the superior court that the certificate was issued by the defendant and accepted by the said Thomas D. on the sixth day of April, 1884, upon certain express conditions and agreements, among which were the following, viz: "The application on the faith of which this certificate is issued is hereby referred to and made a part of this contract. . . . The person to whom this certificate is issued agrees to pay to said company three dollars per annum for expenses, on the first day of the month, after date of issue, and at every anniversary thereafter, so long as this certificate shall remain in force; or by monthly or other pro rata installments of the same in advance for periods of less than a year. And also agrees to pay to said company, upon each certificate that shall become a claim, an assessment in accordance with the table of graduated assessment rates, as printed hereon, within thirty days from day on which notice bears date. And further agrees to pay said company the sum of ten dollars toward said safety fund, within sixty days from the date of this certificate; . . . all such payments to be made direct to said company. . . . The holder of this certificate further agrees and accepts the same upon the express condition that if either the monthly dues, assessments, or the payment of the ten dollars toward the safety fund, as hereinbefore required, are not paid to said company on the day due, then this certificate shall be null and void, and of no effect, and no person shall be entitled to damages, or the recovery of any moneys paid for protection while the certificate was in force, either from ^{ss1} said company or the trustees of the safety fund. . . . A printed or written notice, directed to the address of the member, as it appears at the time on the books of the company, and deposited in the postoffice at Hartford, or delivered by an agent of the company, shall be deemed a legal and sufficient notice for all purposes hereof. A transcript of the books of said company, certified by the secretary, showing such facts, shall be taken and accepted as conclusive evidence of the mailing of such notice,

and of the facts aforesaid, as set forth in such transcript." The application contained, among other stipulations, this one: "And if I, or my representatives, shall omit or neglect to make any payment as required by the conditions of such certificate, then the certificate to be issued hereon shall be null and void, and all money paid thereon shall be forfeited to said company."

It is also found that on the thirtieth day of January, 1891, the defendant made an assessment in due form, as provided by the said certificate, against the holder of the same, and notice of said assessment, in the usual form, was mailed in the postoffice at Hartford, Connecticut, on that day, postpaid, directed to the proper postoffice address of the said Thomas D. Pitts, at Pittsburg, Pennsylvania, which notice showed that there was due to the company by him, by virtue of such assessment and quarterly dues in advance, the sum of six dollars and forty-three cents; which was due and payable at the office of the defendant, in Hartford, on or before March 5, 1891. Said notice, in due course of mail, would have been delivered to said Pitts on or before February 3, 1891. After his death, it was found among his papers. The assessment and dues named in said notice were never paid. Notices of quarterly assessments, in the form above mentioned, had been sent to the said Thomas D. Pitts, for the seven years he had been a member of the defendant company, containing a statement of the amount assessed as his proportion of the mortality fund, and of monthly payments for expenses for three months in advance, in separate items, and he had, during that time, paid the amounts so stated in the notice without objection or dissent.

Thomas D. Pitts, the certificate holder, was, on the twenty-first ~~382~~ day of February, 1891, assaulted and knocked down upon the street, and so severely injured as to become unconscious, and remained so for some time. For some considerable period prior to that day, he had been suffering from a tumor upon the brain, which impaired his mental condition, shown especially by loss of memory of passing events, loss of self-control, and extreme irritability. Upon recovering consciousness from the blow, his mental impairment was noticeably increased, especially the loss of memory, and thereafter he attended to no business, and was unable and unfit to do so.

Upon these facts, two questions are made by the plaintiff: 1. Whether it can be held that such notice of the amounts due was received by Mr. Pitts as to render the policy void by their nonpayment. In the argument, this question is divided into two

parts, which are, Was the notice in fact received by Mr. Pitts more than thirty days before his death? and if so, was its effect avoided by his mental condition? and 2. Whether the notice was itself defective and incompetent to cause a forfeiture of the policy, by reason of the fact that it called for a payment of three months' dues in advance, instead of one month, as allowed by the policy.

In discussing these questions, counsel for the plaintiff claim and assume that the right of the plaintiff to demand and receive the money named in the certificate of membership is not lost, even though the assessment of January 30, 1891, was never paid, unless there had been some action by the defendant company declaring a forfeiture.

In view of this claim, it may serve to simplify these questions, if we first consider the terms of the contract between these parties as set forth in the certificate of membership. It therein appears that the obligation of the defendant to make an assessment on the death of Thomas D. Pitts, and to pay the money thereby received to this plaintiff, was conditional upon the payment to the company of the dues and assessments from him on the day they were due. No affirmative action on the part of the company was needed to cause this obligation to cease. On failure to make payment punctually, the certificate became, by its terms, null and void, and of no ³⁸³ effect. This language is in the application made by Mr. Pitts to the company when he desired to become a member, and is repeated in the certificate. The dealings between this defendant and its members are in accordance with this theory. Whenever a member failed, from any cause, to make the payments as stipulated in the contract, the company required from him an application to be reinstated as a member; and, upon such application, the company decided whether or not that person should or should not be reinstated, and so be or not be longer a member.

The contract shown by this certificate is one where the time of payment is of its very essence. Nonpayment at the day involves absolute forfeiture, because the terms of the contract so prescribe, and the court has no power to vary the stipulations of the parties. It must be conceded that promptness of payment is essential in the business of life insurance as carried on by the defendant. All its calculations are based on the hypothesis of prompt payments. It calculates on the receipt of its assessments and other dues on the day they are payable. And as the amount of the assessment is itself to be determined by the num-

ber and the age of the members who are to pay it, and as these conditions change every day, it is impossible, in a case where a member fails to pay, to restore the company to the condition it would have been in had that member paid on the day. It is on this basis that the defendant is enabled to offer insurance at the favorable rates it does. Forfeiture for nonpayment is a necessary means of protecting itself from embarrassment. Unless it were enforceable, the business of this company would be thrown into utter confusion. Delinquency cannot be tolerated or excused, except at the option of the company. This has always been the understanding and the practice of the defendant with its members. Whatever period of grace is accorded is a matter of stipulation, or of discretion, on the part of the company. And when no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute, if the dues are not paid. We must, therefore, regard the payment of the assessments and ⁸⁸⁴ dues as a condition precedent to any subsequent liability on the part of the defendant: *New York Life Ins. Co. v. Statham*, 93 U. S. 24; *Klein v. Insurance Co.*, 104 U. S. 88; *Worthington v. Charter Oak Life Ins. Co.*, 41 Conn. 401; 19 Am. Rep. 495.

If a course of conduct had been pursued between the company and its members from which a waiver could be found, a different construction would doubtless be put upon the contract. The conduct between the parties in this case has uniformly been in accordance with the strict terms of the certificate, and therefore the strict letter of the contract must be observed: *Hartford etc. Ins. Co. v. Unsell*, 144 U. S. 439.

The finding, by the ordinary rules of evidence, must be taken to mean that the notice of the assessment mailed at Hartford on the thirtieth day of January, 1891, reached Mr. Pitts not later than February 3d following. As this notice was addressed to him at the place where he resided and usually received his letters, it must be presumed that he received it in the due course of mail from Hartford to Pittsburg, Pennsylvania. This presumption is one of fact, and, of course, may be rebutted. But in a case where there is no evidence to the contrary, as in this case, it is the duty of the jury or of the court to find the letter was received: 1 *Greenleaf on Evidence*, sec. 40; *Oaks v. Weller*, 16 Vt. 63; *Russell v. Buckley*, 4 R. I. 525; 70 Am. Dec. 167; *Huntley v. Whittier*, 105 Mass. 392; 7 Am. Rep. 536; *Oregon Steamboat Co. v. Otis*, 100 N. Y. 446; 53 Am. Rep. 221; *Henderson v. Carbondale Coal etc. Co.*, 140 U. S. 26; *Schutz v. Jordan*, 141

U. S. 213; Rosenthal v. Walker, 111 U. S. 185; Marston v. Bigelow, 150 Mass. 45. In this case, the presumption is strengthened almost to a certainty by the fact that the notice was found in the possession of Mr. Pitts.

It is argued by the plaintiff that, although the notice did come into the hands of Mr. Pitts, yet, by reason of his mental condition, he should be treated as though it had never come to him. Here again we must be governed by the terms of the contract between the parties. It is agreed in the certificate of membership, on which this action is brought, that the depositing in the postoffice at Hartford of a written or ³⁸⁵ printed notice, directed to Mr. Pitts at his address, "shall be deemed a legal and sufficient notice for all the purposes" of the contract. The argument of the plaintiff overlooks this stipulation, and assumes that it was the duty of the defendant company to get the notice into the hands of Mr. Pitts, and was also responsible for his condition of mind when he got it. This argument cannot be sustained. The defendant has never undertaken any such obligation as the plaintiff assumes. The language of this court in *Worthington v. Charter Oak Ins. Co.*, 41 Conn. 401, 19 Am. Rep. 495, is exactly applicable to this case:

"In terms, the contract is a simple one. The defendants, in effect, say to the other party, 'pay at the time stipulated and you are insured; omit such payment and our proposition is withdrawn, and your right to insure is extinguished.' It is impossible to put any other construction upon it. There is no room for doubt or uncertainty. The payment required is, in no sense, conditional. The proposition is not pay if convenient; pay unless sudden sickness prevents; pay unless some unexpected turn of fortune deprives you of the means of paying; pay unless the act of God or the law intervenes to prevent payment; but absolute payment is required. To make it still clearer, the proposition is not, if poverty, sickness, accident, or the law prevents payment, you shall be insured the same as if you had paid. None of these risks were taken by the defendant; they were all taken by the insured. Every word of the instrument embodying the agreement of the parties is consistent with this view of the contract, and the whole instrument, when fairly considered, is inconsistent with any other view of it. It would seem that this analysis of the contract would, of itself, be a sufficient answer to the plaintiff's claims."

In *Wheeler v. Connecticut Mut. Life Ins. Co.*, 82 N. Y. 550, 37 Am. Rep. 594, it is said that "while, as a general rule, where the

performance of a duty created by law is prevented by inevitable accident, without the fault of the party, the default will be excused, yet when a person, by express contract, engages absolutely to do an act not impossible or unlawful at the time, neither ~~and~~ inevitable accident, nor other unforeseen contingency not within his control, will excuse him, for the reason that he might have provided against them by his contract: *Harmony v. Bingham*, 12 N. Y. 99, 107; 62 Am. Dec. 142; *Adams v. Nichols*, 19 Pick. 275; 31 Am. Dec. 137; *Leavitt v. Fletcher*, 10 Allen, 119; *Pollard v. Shaffer*, 1 Dall. 210; 1 Am. Dec. 239; *Linn v. Ross*, 10 Ohio, 412; 36 Am. Dec. 95; *School District v. Dauchy*, 25 Conn. 530; 68 Am. Dec. 371; 1 Chitty on Contracts, 11th ed., 67; Rolle's Abridgment, 420. The principle thus established has been especially applied in reference to policies of insurance, where the payment of the premium is held to be a condition precedent which must be kept or the policy falls": See, also, *New York Life Ins. Co. v. Statham*, 93 U. S. 24; *Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y. 160; *Evans v. United States Life Ins. Co.*, 64 N. Y. 304.

The notice sent to Mr. Pitts was a good one, in any event, of the amount of his assessment to the mortality fund. This amount was in the notice, set in an item separate from the amount of the monthly dues. If it be true, as claimed by counsel for the plaintiff, that he had the right to exercise his choice as to whether he would pay the monthly due one month in advance or three months, it would seem that the seven years' usage to pay three months in advance, which he had uniformly followed without objection or dissent, a usage adopted for his safety and convenience as well as for that of the company, would be sufficient to show that he had exercised his choice to pay each three months in advance, and that the notice was not defective.

The superior court is advised to render judgment for the defendant.

In this opinion the other judges concurred.

CONTRACTS—LIFE INSURANCE—EVIDENCE.—One who agrees to do an act must do it unless absolutely impossible. He should provide against contingencies in his contract: *Superintendent v. Bennett*, 27 N. J. L. 513; 72 Am. Dec. 373. The sickness of the assured, disabling him from transacting business, is no excuse for the nonpayment of a life insurance premium: *Carpenter v. Centennial etc. Assn.*, 68 Iowa, 453; 56 Am. Rep. 855. Ordinarily, time is not of the essence of a contract, unless injury would result from the delay: *Note to Johnson v. Evans*, 50 Am. Dec. 675, 676. A clause in a policy rendering it void for the nonpayment of premiums when due does not render it void as to the insurer, but voidable, and this option must be clearly asserted:

Note to *Lantz v. Vermont Life Ins. Co.*, 23 Am. St. Rep. 215. A letter properly stamped and mailed, and containing a notice, is presumed to have been received, but this presumption may be rebutted: *Penny-packer v. Capital Ins. Co.*, 80 Iowa, 56; 20 Am. St. Rep. 395; *German Nat. Bank v. Burns*, 12 Col. 539; 13 Am. St. Rep. 247.

DAVIS v. KING.

[66 CONNECTICUT, 465.]

AGENCY—APPOINTMENT AND AUTHORITY OF SUB-AGENTS.—As a general rule, an agent has no right to delegate his authority to a subagent without the consent of his principal. If, in the absence of such consent, he does delegate his authority, the subagent whom he appoints will be regarded as his agent, and not the agent of the principal.

AGENCY—LIABILITY OF AGENT FOR ACTS OF SUB-AGENT.—If an agent has the consent and authority of his principal to employ a subagent, he may employ one; and if, in so doing, he, in good faith, selects a suitable and proper subagent, he is not responsible to his principal for the acts and omissions of such subagent.

AGENCY—IMPLIED AUTHORITY TO EMPLOY SUB-AGENT.—The consent of a principal to his agent to employ a subagent may be given expressly or by implication.

AGENT, LIABILITY FOR SUBAGENT.—If a subagent, employed with the consent, express or implied, of the principal to collect a note, wrongfully returns it to the maker, who destroys it, giving a renewal note in place thereof to the subagent, the principal agent is not answerable for the act of the subagent in surrendering the note.

Action to recover damages for the conversion of a note placed in the hands of the defendant for collection. The plaintiff recovered a judgment for the value of the note, with interest, and the defendant appealed.

Three notes of a thousand dollars each, payable to the order of a trust company, were secured by a single mortgage on real estate. One of the notes was indorsed to the defendant, an investment broker, who indorsed and sold it to the plaintiff. The plaintiff did not know that the other notes were secured by the mortgage. The defendant was in the habit of collecting the interest coupons for the plaintiff, through the trust company, without charge. The plaintiff's note was not paid when due. The trust company, with the consent of the holders of the other two notes, but without the knowledge of the plaintiff or defendant, extended the loan. After such extension, but before a knowledge of it reached the plaintiff or defendant, the plaintiff placed his note for collection in the hands of the defendant, at the latter's solicitation. The defendant forwarded the note to the trust

company, with instructions to collect and remit to him. When the plaintiff's note was received by the trust company, it wrongfully returned it to the maker, who destroyed it, and sent back a renewal note, which was tendered to the plaintiff, who refused to accept it. The plaintiff thereupon sued the defendant for a conversion of the note, claiming that its delivery by him to the trust company was unauthorized, but it was held that the plaintiff had impliedly authorized the defendant to employ the trust company to collect the note, and that as the loss resulted from the act of his own agent, he must look to him and not to the defendant.

John C. Chamberlain, for the appellant.

Charles E. Searls, for the appellee.

469 TORRANCE, J. This is an action to recover damages for the conversion of a note. The court below made a finding of facts, and upon those facts rendered judgment for the plaintiff, and from that judgment the defendant brings the present appeal.

The following is a somewhat condensed statement of the facts found: On and before June 1, 1890, the defendant was in business in Danielsonville in this state, under the name of C. D. King & Co., and advertised himself under that name as an investment broker and negotiator of southern loans. He continued said business there under that name down to the time of the trial. About June 1, 1890, the plaintiff, at the solicitation of the defendant, purchased of him the note in question. It was dated June 1, 1888, for the sum of one thousand dollars, signed by one Colley, payable to the order of the Georgia Loan and Trust Company, and due five years from date, with interest at eight per cent, payable semi-annually. It was indorsed by the Georgia Loan and Trust Company to the defendant, and by him to the plaintiff. No mortgage deed or other papers accompanied the note, and the plaintiff never saw any papers, other than it, although he understood that the note was secured by mortgage to the loan and trust company, on certain real estate situated in Georgia. The note sold to the plaintiff was one of three notes, of like amount, tenor, and date, made by Colley in June, 1888, to said loan and trust company, for a loan of three thousand dollars then made by it to him, and all three notes were secured by one and the same mortgage deed of trust, made by Colley to said company, upon land of his in Georgia. The company desired to have the notes made in three amounts for convenience

in selling, and for the purpose of negotiating them. The court finds that the plaintiff did not know, until after the maturity of the extension coupon hereinafter referred to, that any ⁴⁷⁰ other notes than his own were secured by said trust deed, but there was a statement of that fact upon his note. When the note came due, the plaintiff, at the request of the defendant, consented to an extension for three months, and subsequently received, through the defendant, an extension coupon to cover the interest of said three months, and dated June 1, 1893, which coupon was afterward paid. Prior to this time, the defendant had collected for the plaintiff the interest coupons upon this note as they came due. The defendant did this through the firm of Burr & Knapp of Bridgeport in this state, who were investment brokers, and one of whom was the president of the Georgia Loan and Trust Company; and the Connecticut office of that company was in the office of Burr & Knapp, who were its general managers in this state. Where the Georgia company was located, or any other facts concerning it, the evidence did not disclose. The defendant, among other loans, handled those of this Georgia company, through Burr & Knapp, but under what arrangement did not appear. The coupons upon plaintiff's note as they came due were sent by defendant to Burr & Knapp, and the money, when received by them, was sent to the defendant and paid by him to the plaintiff. When the extension coupon came due, the note remained unpaid, and the plaintiff, on September 20, 1893, "at the solicitation of the defendant, and relying upon his assurance that, if he would give the defendant the note for collection, the defendant would get the amount due upon it in a very short time, delivered said note to the defendant, with positive instructions to collect the amount due thereon, and received from him a receipt therefor, reading as follows:

"Received of George R. Davis, note 2441, Georgia Loan, 1994 for \$1000 for collection. Matured Sept. 1st, 1893. Placed in our hands at first on Sept. 20th, 1893.

"C. D. KING & CO."

Nothing was said between the parties as to any compensation to be paid the defendant for the collection of said note, and he never expected anything would be paid, unless some difficulty arose in making the collection; but the plaintiff understood that the defendant would attend to its collection, as he had ⁴⁷¹ attended to the collection of coupons, as a duty assumed by him, as the negotiator of the loan, toward the plaintiff, as its purchaser, for the promotion of his brokerage business. No instruc-

tions were given to the defendant as to the course to be pursued in collection. The defendant at once sent the note to Burr & Knapp, and instructed them to collect the same and remit the money to him. Prior to this time, the trust company, with the consent of the holders of the other two Colley notes, had agreed with Colley to extend the loan for a period of five years. Colley had executed three new notes, and a new mortgage of the same land to secure the new notes, to a company called the Security Investment Company, but what this new company was, or where located, the evidence did not disclose. It was the judgment of the trust company that it was for the interest of the holders of the original Colley notes that the first mortgage should not be foreclosed. These facts were unknown to the plaintiff when he placed his note in defendant's hands for collection, nor were they discovered by him for a long time thereafter. Burr & Knapp, on receipt of the note, forwarded it to the trust company, and it at once delivered the note to Colley, and it was by him presumably destroyed. The three renewal notes were payable in five years from date, with interest at seven and one-half per cent per annum, payable annually. One of these renewal notes was sent by Burr & Knapp to the defendant, and he tendered it to the plaintiff, who refused to accept it, and demanded the original note, or the money due on it. The plaintiff then, for the first time, learned of the existence of the firm of Burr & Knapp, and the business relations of the defendant with them, and that others besides himself were interested in the loan.

Upon these facts, the defendant claimed, among other things, that the trust company was not the agent of the defendant, but was the trustee and agent of the plaintiff; and that the defendant, in forwarding the note in due course of business to the trust company with instructions to collect, had performed his duty to the plaintiff, and was not liable for the default or misconduct of the trust company. ⁴⁷² The court overruled these claims, and held that the defendant was an independent contractor for the collection of the note; that Burr & Knapp and the trust company were the agents of the defendant, and not of the plaintiff; that there had been a conversion of the note; that defendant was liable for a failure to return either the note or the money; and rendered judgment for the amount of the note and interest.

It appears from this finding that the Georgia Loan and Trust Company, either as the agent of the plaintiff or of the defendant, wrongfully delivered up to Colley the property of the plaintiff,

so that it became lost to him. If, in so doing, the trust company was the agent of the defendant, then he is liable for the damage thereby occasioned to the plaintiff; but if it was the agent of the plaintiff, then the defendant is not liable for such damage. As a conclusion of law from the facts found, the court below held that the trust company was the agent of the defendant, and not of the plaintiff; and whether it erred in so holding is the principal question upon this appeal.

The law applicable in cases of this kind is tolerably well settled. As a general rule, an agent has no right to delegate his authority to a subagent without the consent of his principal. If, without such consent, he does delegate his authority, the subagent whom he appoints will be regarded as his agent, and not the agent of the principal. On the other hand, if an agent has the consent and authority of his principal to employ a subagent, he may employ one; and if, in so doing, he in good faith selects a suitable and proper subagent, he is not responsible to his principal for the acts and omissions of such subagent. Furthermore, this consent and authority from the principal to the agent to employ a subagent may be given expressly or by implication: Story on Agency, sec. 201; Evans on Principal and Agent, c. 6, sec. 2; Mecham on Agency, sec. 513.

Bearing in mind these principles, it is clear that the question whether or not the trust company was the agent of the defendant for whose acts he was responsible, depends on ⁴⁷⁸ the answer to the further question, whether the plaintiff expressly or impliedly authorized the defendant to forward the note to that company for collection. If he did, then the trust company was the agent of the plaintiff, and not of the defendant. As no claim is made that there was any express authorization of this kind, the inquiry is narrowed down to this: Do the facts found warrant the conclusion, as matter of law, that there was an implied authorization?

The court below must necessarily have held that there was no such implied authorization, and in this we think it erred. Upon the facts found, and as matter of law, we think the plaintiff impliedly authorized the defendant to employ the trust company to collect the note. The facts in this case are somewhat peculiar. The defendant was not a collection agent, nor an attorney at law engaged in the collection of claims; his principal business was that of a broker and negotiator of loans and investments. As such he had acted as the agent of the trust company in selling the note in question, and this was known to the plaintiff when

he bought the note. He was not engaged personally and for profit in the collection business, and did not hold himself out as such a collector. It is true that he had collected the interest coupons for the plaintiff, upon this note, and, doubtless, he did the same thing for other customers; but this was done incidentally, as a matter of favor to those customers, and without charge for such services, for the purpose, no doubt, of retaining their custom as purchasers and investors. When the note became due, the defendant undertook to collect that, just as he had the interest on it, as an accommodation to his customer, and without fee, or reward, other than the advantages that might possibly spring from retaining the goodwill of the customer. This statement is, we think, a fair inference from the finding upon this point. Then, again, the facts relating to the note itself are somewhat exceptional in their nature. It was secured by a mortgage deed of land in Georgia, made to the Georgia Trust Company as trustee for the plaintiff, as the holder of the note; and that mortgage deed was in the hands of the trustee, and could be foreclosed only ⁴⁷⁴ in Georgia by a proceeding in the name of the trustee. At the time the note was delivered to the defendant to collect, there was nothing to indicate that it could be collected, except by resorting to the security by means of a foreclosure suit; and the natural and ordinary way to do this, and for aught that then appeared, the best way, was to forward the note to the trustee, with instructions to collect it by foreclosure proceedings, unless the note was paid on demand. It was the duty of the trustee to bring the foreclosure on request, or at least to allow the proceeding to be brought in his name, and this could only be done in Georgia where the maker of the note lived and where the property mortgaged was situated. No good reason for not pursuing such a course was then known to plaintiff or defendant; neither of them then knew that the trust company had already made a new arrangement with Colley; and neither of them had any reason to anticipate that the trust company would wrongfully surrender the note. All these things the plaintiff knew just as well as the defendant. He must have known that the plaintiff was not to go personally to Georgia to collect the note; he must have known that the collection of the note could probably be enforced only by a resort to the security; he must have known that the only natural and feasible way to enforce the security was through his trustee, the Georgia Trust Company; and he must have known that the defendant would be, in a measure, compelled to select the trust company as a subagent in this mat-

ter, and to intrust to it the note in question. It was under and in view of all these circumstances that the defendant made the agreement to collect the note, and looking at them all, we think the legal conclusion must be that the plaintiff impliedly authorized the defendant to employ the trust company in this matter and to forward to it the note in question for collection.

The principles applied in *East Haddam Bank v. Scovil*, 12 Conn. 303, fully justify this conclusion; and the facts in the present case are much stronger in favor of such a conclusion than were the facts in that case.

The duty which devolved upon the defendant, by virtue of ⁴⁷⁵ his undertaking, he fully performed. He promptly and safely forwarded the note to the trustee, with instructions to make immediate collection. The fact that he did this through Burr & Knapp, is of no legal significance. They were guilty of no delay in forwarding it, and of their conduct in this respect the plaintiff makes no complaint. The only thing he really complains of is the conduct of his trustee in wrongfully giving up the note. This was, undoubtedly, a wrong amounting to a conversion, for which his trustee is legally answerable; but, as his loss resulted from the act of his own agent, he must look to him, and not to the defendant.

This view of the case renders it unnecessary to consider any of the other points raised on the appeal.

There is error in the judgment of the court below, and it is reversed.

In this opinion the other judges concurred.

Subagents, and Their Relation to the Principal and to the Agent Appointing Them.

Power to Appoint—General Rule.—An agent is generally selected with an eye to his intelligence, prudence, and integrity. It is these qualities in which the principal confides, and he employs the agent from the opinion which he has of his personal skill and integrity. The agent, therefore, has no right to turn his principal over to another, of whom he knows nothing, whatever may be the intelligence, discretion, integrity, and business capacity of the stranger or subagent. In addition to this, matters of judgment and discretion are often committed to agents. The agency, in such cases, becomes a personal trust and confidence, which cannot, of course, be delegated to another. Hence, it is a general rule that, in all cases of delegated authority, where personal trust or confidence is reposed in the agent, and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal, and cannot be delegated to another, unless there is a special power of substitution, either express, or necessarily implied: *Lyon v. Jerome*, 26 Wend. 485; 37 Am. Dec. 271; *Wright v. Boynton*, 37 N. H. 9; 72 Am. Dec. 319; *Gillis v. Bailey*, 21 N. H. 149; *Lynn v. Burgoyne*, 13 B. Mon. 400; *White v. Davidson*, 8 Md. 169; 63 Am. Dec. 699; *Stoughton v. Baker*, 4 Mass. 522; 3 Am. Dec. 236; *Con-*

nor v. Parker, 114 Mass. 331; Smith v. Sublett, 28 Tex. 163; Furnas v. Frankman, 6 Neb. 429; Loomis v. Simpson, 13 Iowa, 532; Barrett v. Rhem, 6 Bush, 466; Hunt v. Douglass, 22 Vt. 128; Paul v. Edwards, 1 Mo. 30; Pendall v. Rensch, 4 McLean, 259; Dorchester etc. Bank v. New England Bank, 1 Cush. 177; Commercial Bank v. Norton, 1 Hill, 501; Sayre v. Nichols, 7 Cal. 535; 68 Am. Dec. 280; Lewis v. Ingersoll, 3 Abb. App. Dec. 55.

Thus, authority conferred upon canal commissioners to enter upon and take possession of land, etc., of individuals for the construction of a canal, can be executed only by them in person, or under their express direction. It must follow, of course, that an engineer, or any other subagent of the state, cannot lawfully exercise such power without the express direction of the canal commissioners, or one of them, even if such engineer or other subagent has been intrusted with the duty of superintending the canal in the vicinity of the premises entered upon: Lyon v. Jerome, 26 Wend. 485; 37 Am. Dec. 271; Stoughton v. Baker, 4 Mass. 522; 3 Am. Dec. 236. So the directors of a corporation are not authorized to delegate their authority to lease premises of the corporation. The directors of a corporation are merely its agents, and are not the corporation: Gillis v. Bailey, 21 N. H. 149. A contract between the owner of a land certificate and his agent, by which the agent is employed and empowered to locate the certificate, involves a personal confidence reposed in the agent, and does not, in the absence of an express power of substitution, or of an established custom of the country, confer upon the agent the right to transfer the trust to another person. The mere possession of the certificate does not imply a power in the holder to employ another person to locate it: Smith v. Sublett, 28 Tex. 163. It has been held that an agent cannot delegate the power to receive money, for this involves discretion or trust: Lewis v. Ingersoll, 3 Abb. App. Dec. 55; but there are cases to the contrary: Grinnell v. Buchanan, 1 Daly, 538. A power of attorney must be executed in the name of the person who gives it: See monographic note to Davenport v. Parsons, 81 Am. Dec. 777, on powers of attorney. But the rule that an agent, public or private, cannot delegate his authority in cases requiring the exercise of judgment and discretion, is said not to apply to the indorsements of drafts by a deputy in the state treasurer's office: Note to Newton v. Bronson, 67 Am. Dec. 105.

Exceptions.—To the general rule that an agent has, ordinarily, no power to appoint a subagent, there are, however, a number of exceptions; as, where the agent has express authority to employ a subagent; where the act to be done is purely ministerial; where the agent is allowed to do so by a lawful custom or usage; where the object of the agency cannot lawfully be attained otherwise; or where the principal is aware that his agent will appoint a subagent. These several exceptions to the general rule will be examined in their order.

Implied Authority.—An authority to appoint a subagent or substitute, between whom and the principal a privity will exist, may be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute: De Bussche v. Alt, 8 Ch. Div. 286, 310; Appleton Bank v. McGilvray, 4 Gray, 518; 64 Am. Dec. 92. The principal may confer the power of delegation or substitution, either expressly or impliedly, or he may, after delegation by the agent, ratify or confirm it in such manner as to make the subagent responsible directly to the principal; but the fact that the principal knows that a subagent will be employed does not destroy the liability of the agent to the principal: Loomis v. Simpson, 13 Iowa, 532.

Express Authority.—As said in the principal case, the consent and authority from the principal to the agent to employ a subagent may be

given expressly or by implication. If a general agent is specially authorized to employ subagents to act in the name of his principal, the further authority to bind the principal for their payment will be implied: *Furnas v. Frankman*, 6 Neb. 429.

Ministerial Acts.—While an agent cannot delegate any portion of his power requiring the exercise of discretion or judgment, he may do so as to powers or duties merely ministerial in their nature: *Sayre v. Nichols*, 7 Cal. 535; 68 Am. Dec. 280; *Renwick v. Bancroft*, 56 Iowa, 527; *Newell v. Smith*, 49 Vt. 255; *Norwich University v. Denny*, 47 Vt. 13; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566; *Williams v. Woods*, 16 Md. 220; *Eldridge v. Holway*, 18 Ill. 445; *Grinnell v. Buchanan*, 1 Daly, 538.

The rule that an agent cannot delegate his powers unless the subagency is directly authorized or ratified by his principal, with full knowledge of the facts, has no application to acts purely ministerial. In such cases, if the agent directs the act, or, being aware of the circumstances, afterward adopts it as his own, that is sufficient: *Grady v. American Cent. Ins. Co.*, 60 Mo. 116. Hence, if empowered to bind his principal by an accommodation acceptance, he may direct another to write it, having first determined the propriety of the act himself; and it will bind the principal, though naming the delegate, and not the agent, as the one exercising the power: *Commercial Bank v. Norton*, 1 Hill, 501. So, if an agent is authorized by the owners to sell certain lands, exercising his own discretion as to price and terms after an examination of the land, he may lawfully employ a subagent to find a purchaser, and a sale made by such subagent is binding upon the owners: *Renwick v. Bancroft*, 56 Iowa, 527. If a person is a freight and passenger agent, his office clerk's signature of the agent's name to a contract of shipment, the execution of such contracts being a part of his duties, will bind the agent's principal in the same way as if the agent had signed his own name: *Newell v. Smith*, 49 Vt. 255. So one having authority to sign the name of another to a subscription paper may procure a third to do it in his presence: *Norwich University v. Denny*, 47 Vt. 13. Again, if a policy of insurance is signed by a subagent for the agent, and the latter afterward takes the policy, receives the premium, and, with full knowledge of the facts, redelivers the instrument, it thereby becomes the act of the company as much as though signed by the agent himself. That such authority in the subagent is recognized by the company may be shown by proving previous transactions of a similar character: *Grady v. American Cent. Ins. Co.*, 60 Mo. 116. An insurance agent can employ a clerk and authorize him to contract for risks, to deliver policies and renewals, and to collect premiums and to give credit therefor. The act of the clerk in such cases is the act of the agent and binds the company: *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566. So a broker, having made a contract of sale, may authorize his clerk to make and sign an entry or memorandum thereof, under the broker's direction and in his presence, so as to bind the parties named in the contract; and the clerk may reduce the contract to writing and sign it, where he exercises no discretion, but merely acts ministerially, or mechanically, under the direction and supervision of his employer, the broker: *Williams v. Woods*, 16 Md. 220. And an attorney in fact may, by another acting for him, serve a notice upon a party in possession, as a foundation for a proceeding by forcible entry and detainer: *Eldridge v. Holway*, 18 Ill. 445. "There is," said the court, "neither confidence, skill, discretion, or judgment required to deliver a written notice, and make oath of it, which could prevent the employment of anyone by an agent. The maxim withholding the power of subdelegation of authority only has place when there is an object and end to be gained—where the interest of the principal may be neglected or injured by substitution. When, from the nature of the act to be done, there can be no difference, the principle cannot apply": *Eldridge v. Holway*, 18 Ill. 445, 448.

Usage, Custom, or Course of Trade.—The appointment of a subagent may be justified by a known and established usage or course of dealing. If the principal constitutes an agent to do a business as to which there is a known and established usage of substitution, the principal must be held to have expected and authorized such substitution: *Planters' etc. Nat. Bank v. First Nat. Bank*, 75 N. C. 534; *Darling v. Stanwood*, 14 Allen, 504; *Laussatt v. Lippincott*, 6 Serg. & R. 386; 9 Am. Dec. 440. Thus, if a commission merchant is employed here to buy goods in a distant market, and the custom of that market is for commission merchants to employ brokers to make such purchases, and this custom is understood by the principal, the commission merchant may properly employ a broker of experience and good reputation to make the purchases; and, if he does so, he will not be liable for such broker's errors or misconduct: *Darling v. Stanwood*, 14 Allen, 504. So, where goods were intrusted by the plaintiff to a merchandise broker to sell, deliver, and receive payment, and the broker deposited them, in accordance with usage, with a commission merchant connected with an auctioneer, taking his note therefor, and some of the goods were afterward sold at a less price than the broker was authorized to sell them for, it was held that the principal was bound by such act of the broker, and that he could not maintain trover against the commission merchant: *Laussatt v. Lippincott*, 6 Serg. & R. 386; 9 Am. Dec. 440. In this case the court said: "Business to an immense amount has been transacted in this manner, and, the usage being established, it follows, that when the plaintiff authorized his broker to sell, he authorized him to sell according to the usage; and when the defendants dealt with the broker, even if they had known that the goods were not his own, they had a right to consider him as invested with power to deal according to the usage." So, where defendants employed an architect to draw a specification of a building proposed to be erected, and the architect employed the plaintiff to make out the "quantities," or calculations, which work was to be paid for by the successful competitor for the building contract, the defendants, upon refusing to allow the building to proceed, on account of a dispute between them and the architect, are liable to the plaintiff for making out the "quantities," or calculations, especially where there is a usage in the trade for architects or builders to have their "quantities," or calculations, made out by surveyors, where the custom is beneficial to the parties concerned, and where the defendants themselves had an intimation that that was the practice: *Moon v. Guardians of Whitney Union*, 3 Bing. N. C. 814.

Necessity—Acquiescence.—The fourth exception above mentioned may be treated under the head "Necessity." It is a well-established principle, that the authority of an agent is always construed to include all the necessary and usual means of executing it properly: *Howard v. Baillie*, 2 H. Black. 618, 620; and it clearly follows that if an agent can show that instructions of his principal could not be carried out except through subagents, he is justified in delegating so much of his authority as the nature of the agency requires. In other words, the employment of subagents is imperatively necessary in many instances, and the interests of the principal will suffer if such subagents are not employed. In such cases, the power to employ the necessary subagents will be implied: *Planters' etc. Bank v. First Nat. Bank*, 75 N. C. 534; *Speight v. Gaunt*, 9 App. Cas. 1, 29; *Rossiter v. Trafalgar Life etc. Assn.*, 27 Beav. 377; *Dorchester etc. Bank v. New England Bank*, 1 Cush. 177; *Harralson v. Stein*, 50 Ala. 347; *Tiernan v. Commercial Bank*, 7 How. 649; 40 Am. Dec. 83; *Commercial Bank v. Martin*, 1 La. Ann. 344; 45 Am. Dec. 87; *Buckland v. Conway*, 16 Mass. 396; *Strong v. Stewart*, 9 Heisk. 137, 147.

Thus, a trustee may, in the administration of the trust fund, avail himself of the agency of third parties, such as bankers, brokers, and others, if he does so from a moral necessity, or in the regular course of business; and, if a loss to the trust fund should be occasioned thereby, the trustee will be exonerated, unless some negligence or default of his

has led to that result: *Speight v. Gaunt*, 9 App. Cas. 129. A proposal for a life insurance policy was accepted, on behalf of a London assurance company, by their agent in Australia, who acted in the transaction through the medium of a subagent. The premium was paid, and the transaction was held binding on the company, although the agent had no authority to appoint a subagent, and although there were some informalities, but of form only: *Rossiter v. Trafalgar Life etc. Assn.*, 27 Beav. 377. So, where a draft, payable at a distant place, is left with a bank for collection, it must be presumed that it is intended to be transmitted to a subagent, at the place where it is payable, and not that the bank is to employ its own officers to proceed there, for the purpose of obtaining payment: *Dorchester etc. Bank v. New England Bank*, 1 Cush. 177; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13; 45 Am. Dec. 72; *Commercial Bank v. Martin*, 1 La. Ann. 344; 45 Am. Dec. 87; *Appleton Bank v. McGilvray*, 4 Gray, 518; 64 Am. Dec. 92. Again, if a note is sent to a bank for collection, and, for the protection of the principal, it becomes necessary to have the note protested, the authority of the bank to employ the proper officer will be implied: *Tiernan v. Commercial Bank*, 7 How. 648; 40 Am. Dec. 83. So, an agent employed to collect a demand by suit has implied power to employ the necessary attorneys: *Commercial Bank v. Martin*, 1 La. Ann. 344; 45 Am. Dec. 87; *Buckland v. Conway*, 16 Mass. 396; or, if authorized to sell goods, to employ a broker or auctioneer: *Harralson v. Stein*, 50 Ala. 347; *Strong v. Stewart*, 9 Heisk. 137, 147; or, if authorized to charter a vessel, to employ a vessel broker to assist him in securing the charter: *Saveland v. Green*, 40 Wis. 431. The master of a vessel who carries goods to a distant port, with orders to dispose of them for the most he can obtain, will be justified, if he is unable to find a purchaser, in placing the goods in the hands of a merchant in good standing, to be sold for the owner's benefit: *Day v. Noble*, 2 Pick. 615; 13 Am. Dec. 463.

The legal maxim, that an agent cannot delegate his authority to a subagent, is not of universal application to factors and commission merchants, and can only be invoked by the principal, when sought to be charged by the act of the subagent: *Harralson v. Stein*, 50 Ala. 347.

The fifth exception above mentioned is based upon an assumption of the tacit consent or acquiescence of the principal. "*Semper qui non prohibet pro se intervenire, mandari creditur*," was the maxim of the civil law. If the appointment of a subagent was contemplated by the parties at the time of the creation of the agent's authority, or if it was then expected that subagents might or would be employed, this must be treated as at least implied authority for such an appointment: *Planters' etc. Nat. Bank v. First Nat. Bank*, 75 N. C. 534.

Arbitrators cannot, as a general rule, delegate their powers. They are selected by parties who have placed particular confidence in their personal judgment, discretion, and ability, and it would be a palpable injustice if they were permitted to delegate their responsibilities and powers to others. Hence, if arbitrators delegate their powers, the award is totally void: *Lingood v. Eade*, 2 Atk. 501, 505. They must give their own judgment upon the matter, submitted, uninfluenced by that of others: *Little v. Newton*, 2 Scott. N. R. 509; *Whitmore v. Smith*, 5 Hurl. & N. 824; *Eads v. Williams*, 4 De Gex, M. & G. 674; but it is perfectly proper for them, in a case requiring it, to obtain, from disinterested persons of acknowledged skill, such information and advice in reference to technical questions submitted to them as may be necessary to enable them to come to correct conclusions. The award, however, must be the result of their own judgment, after obtaining such information: *Anderson v. Wallace*, 3 Clarke & F. 26; *Caledonian Ry. Co. v. Lockhart*, 3 Macq. 808; *Eads v. Williams*, 4 De Gex, M. & G. 674; *Soulsby v. Hodgson*, 3 Burr. 1474. Where, however, parties have agreed to have their dispute settled by laymen, it is legal misconduct for one of the arbitrators to insist upon having a lawyer at his elbow to assist him from time to time with his advice, and to be present throughout the proceedings for the purpose of regulating the con-

duct of the arbitration, especially where objection to his presence is made by one of the arbitrators: *Proctor v. Williams*, 8 Oom. B., N. S., 386, 390. But there is no valid objection to arbitrators availing themselves of such mechanical or ministerial assistance as the nature of their duties may require: *Thorp v. Cole*, 2 Oromp. M. & R. 367; *Moore v. Barnett*, 17 Ind. 349.

Attorneys.—By the employment of an attorney at law, a personal trust is reposed which cannot be delegated to another, except with the consent of the client. An attorney, with ordinary powers, cannot delegate his authority to another, so as to raise a privity between such third person and his principal, or to confer on him, as to the principal, his own rights, duties, and obligations: *Hitchcock v. McGehee*, 7 Port. 556; *Johnson v. Cunningham*, 1 Ala. 249; *Ratcliff v. Baird*, 14 Tex. 43. But, if an attorney does delegate his powers without authority, and this act is afterward assented to by the party interested, with full knowledge of the facts, it will be as binding on him as if done by his authority. Even if information is seasonably given to the person interested, of such unauthorized delegation, and he does not dissent from it, he will be held to have acquiesced in it, as silence in such a case will amount to a ratification: *Hitchcock v. McGehee*, 7 Port. 556. A client is entitled to the personal services of his attorney upon the argument. The retainer of one member of a firm is a retainer of all, and, unless otherwise stipulated, the cause may be argued and conducted by any one of them. Hence, if a client knowingly permits his case to be argued by a person in the service of his attorneys and under their direction, he is presumed to have consented thereto: *Eggleston v. Boardman*, 37 Mich. 14.

An attorney who employs another attorney to make a collection placed in the hands of the former is liable for the acts of the latter in collecting the money and not paying it over. The receipt of claims, "for collection," imports an undertaking by the attorney himself to collect, and not merely that he receives the claims for transmission to another for collection, for whose negligence he is not to be responsible. He is therefore liable by the very terms of his receipt for the negligence of the distant attorney, who is his agent, and he cannot shift responsibility from himself upon his client. There is no hardship in this, for it is in his power to limit his responsibility by the terms of his receipt, when he knows he must employ another to make the collection: *Bradstreet v. Everson*, 72 Pa. St. 124; 13 Am. Rep. 665, per Agnew, J.; *Cummins v. Heald*, 24 Kan. 600; 36 Am. Rep. 264. An attorney is civilly liable for the acts of the attorney he employs, in collecting and failing to pay over moneys collected for the former: *Pollard v. Rowland*, 2 Blackf. 22; *Cummins v. McLain*, 2 Ark. 402; *Wilkison v. Griswold*, 12 Smedes & M. 669; *Abbott v. Smith*, 4 Ind. 452; *Walker v. Stevens*, 79 Ill. 193. The collecting attorney is, of course, directly liable to the transmitting attorney: *Lewis v. Peck*, 10 Ala. 142.

A *Licensed Auctioneer* cannot delegate to another his authority to sell: *Stone v. State*, 12 Mo. 400; *Coales v. Trecothick*, 9 Ves. 234, 250; but he may employ another person to use the hammer and make the outcry under his immediate direction and supervision; and his occasional absence during the sale will not subject his substitute to the penalties of the statute against selling by auction without a license: *Commonwealth v. Harnden*, 19 Pick. 482. A statute forbidding an auctioneer to authorize any person to act as his substitute does not prevent him from employing a crier, if the auctioneer superintends the sale in person: *Poree v. Bonneval*, 6 La. Ann. 386. If, by the terms of a deed of trust, a United States marshal is authorized to sell the property described, a sale made by a deputy of such marshal as "auctioneer" is void, and passes no title to the purchaser: *Singer Mfg. Co. v. Chalmers*, 2 Utah, 542. So a sheriff has no power to authorize the attorney of one of the parties to adjourn a judicial sale. For such an irregularity, a sale on the day to which the adjournment was made will be held invalid: *Wolf v. Van Metre*, 27 Iowa, 348.

Brokers.—A principal employs a broker from the opinion he entertains of his personal skill and integrity; and the broker cannot, ordinarily, delegate his authority without the assent of his principal: *Cockran v. Irlam*, 2 Maule & S. 301; *Henderson v. Barnewall*, 1 Younge & J. 387. But this general rule may be affected by the usages of business: *Gheen v. Johnson*, 90 Pa. St. 38. Thus, an order for stocks being general in its terms, not directing the purchase to be made in any particular place or mode, and not containing any restrictions as to price, a stockbroker, intrusted with the purchase, has the right to make it in a distant city through correspondents, brokers, or subagents residing and doing business in that city: *Rossenstock v. Tormey*, 32 Md. 169; 3 Am. Rep. 125. A broker may, of course, perform mere ministerial or mechanical acts by a subagent: *Williams v. Woods*, 16 Md. 220. The implied understanding in all cases where a purchase and sale are intrusted to a broker is, that the purchaser looks to his broker, the broker to his correspondent, and the latter to the party who sells to him: *Gregory v. Wendell*, 40 Mich. 432, 442.

Collection Agencies, receiving and transmitting claims to their own attorneys, who collect the money and fail to pay it over, are liable for the neglect of such attorneys, in the absence of an express stipulation to the contrary in their receipt given for the claim: *Bradstreet v. Everson*, 72 Pa. St. 124; 13 Am. Rep. 665; *Morgan v. Tener*, 83 Pa. St. 305. An attorney employed, not by a creditor, but by a collection agent, is the agent of the collecting agent, and not of the creditor who employed that agent: *Hoover v. Wise*, 91 U. S. 308, 315. Such agencies may, of course, relieve themselves from liability by express contract. Thus, if one leaving a claim for collection with a "mercantile agency," having a "collection department," signs receipts stating the amount of the claim, and that it is to be transmitted, at his risk and his account, by mail, for collection or adjustment, to an attorney, the proceeds to be paid over, or accounted for to him, when received by the agency from the attorney, the receipt, in the absence of any proof of fraud respecting it, fixes the rights and liabilities of the parties in regard to the claim, even if accepted or subscribed without its being read, and the agency is not liable for the acts or default of the attorney employed by it to collect the claim, unless it was guilty of gross negligence in the selection of the attorney: *Sanger v. Dun*, 47 Wis. 615; 32 Am. Rep. 789.

One who receives paper which it is his duty to collect, and places it in the hands of a competent attorney at law, is not responsible for the opinions or directions of the attorney; *Joor v. Sullivan*, 5 La. Ann. 177. While the mere act of one bank's presenting paper by mail to another bank, upon which it is drawn, for payment, instead of employing a messenger to present it, does not constitute the drawee an agent of the sender to receive or hold the proceeds: *Indig v. National City Bank*, 80 N. Y. 100; there may be facts which will establish the agency of the drawee for the collecting bank, and make valid the drawee's act in discharging the drawer and substituting itself as debtor for the amount: *Briggs v. Central Nat. Bank*, 89 N. Y. 182; 42 Am. Rep. 285. A bank, which assumes the duty of a collecting agent, is sometimes held to be absolutely liable for any negligence or default of a notary, correspondent, or other subagent employed by it, as well as for its own immediate servants, in relation to it: *Davey v. Jones*, 42 N. J. L. 28; 36 Am. Rep. 505. Hence, if a bank accepts a draft from a customer for collection, without any special contract as to its liability, and transmits it for collection to an agent, who collects it, and fails to account for the proceeds, the bank is liable to its customer for the amount collected on such draft: *Power v. First Nat. Bank*, 6 Mont. 251. So a bank which acts as the collecting agent of another bank must use reasonable diligence and care, and if, in consequence of a failure to do so, a loss results, it is liable: *Trinidad Nat. Bank v. Denver Nat. Bank*, 4 Dill. 290. Thus, if the owner and holder of a note delivers it to one bank, with the understanding that it shall be forwarded to another bank for collection, and it is so forwarded and received, the

latter bank is responsible to the owner of the note for any negligence in collecting it, whereby he suffers loss: *Bank of Lindsborg v. Ober*, 31 Kan. 599. An express company, intrusted with the collection of a claim, is liable for the default of a notary, or other agent employed by it in making the collection: *American Express Co. v. Haire*, 21 Ind. 4; 83 Am. Dec. 334; *Palmer v. Holland*, 51 N. Y. 416; 10 Am. Rep. 616. The authorities, however, concerning the status, duties, and liabilities of banks as collecting agents are not harmonious. The subject is minutely discussed in the monographic notes to *Isham v. Post*, 38 Am. St. Rep. 775, and *Allen v. Merchants' Bank*, 34 Am. Dec. 313, showing, particularly, the liability of banks for the negligence of notaries, correspondents, and other subagents employed in making collections. There is, therefore, no necessity here for further allusion to the subject. It may be observed, however, that the rule in New York is, that it is not within the implied authority of the collecting agent, when paper is to be collected at some place remote from that of the business of such agent, to employ a subagent in that locality, to make collection on account of the owner, but, in the absence of any agreement or understanding to the contrary, the collecting agent is deemed to employ such other collector on his own account, and the collecting agent becomes chargeable to his principal for the conduct of the bank or individual to whom he transmits his principal's paper for collection: *Bank of Clarke County v. Gilman*, 81 Hun, 486.

Factors are employed because trust and confidence are reposed in their ability and integrity, and the execution of this trust and confidence cannot, in general, be delegated to another: *Warner v. Martin*, 11 How. 209; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. 520; *Campbell v. Reeves*, 3 Head, 226; *Loomis v. Simpson*, 13 Iowa, 532; *Catlin v. Bell*, 4 Camp. 183. They must execute it themselves, personally, unless authority to substitute another is expressly or impliedly conferred by the principal: *Campbell v. Reeves*, 3 Head, 226. The utmost relaxation of the rule, *Potestas delegata non potest delegare*, in respect to mercantile persons is, that a consignee or agent for the sale of merchandise may employ a broker for the purpose, when such is the usual course of business. Or, where the usual course of the management of the principal's concerns in the employment of a subagent has been pursued for a length of time, and been recognized by the owners of property, they will be taken to have adopted the acts of the subagent as the acts of the agent himself: *Warner v. Martin*, 11 How. 209, 223. A sale of goods consigned to a factor, by a third person, under the factor's delegation of authority, but without the principal's consent, or a usage of trade, is a conversion by the factor: *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. 520; and the principal may either sue in trover, grounding his action on the tort, or waive the tort and recover the value of the goods in an action of assumpsit based upon the breach of the implied contract: *Campbell v. Reeves*, 3 Head, 226; *Solly v. Rathbone*, 2 Maule & S. 298. In such a case, the subagent cannot recover any compensation for his services from the principal: *Schmaling v. Thomlinson*, 6 Taunt. 147. In *Harralson v. Stein*, 50 Ala. 347, it is said, however, that the legal maxim, that an agent cannot delegate his authority to a subagent, is not of universal application to factors and commission merchants, and can only be invoked by the principal, when sought to be charged by the act of the subagent.

Insurance Agents have power to employ the usual and necessary clerical assistants, who, when so employed, may exercise the powers usually incident to their position: *Arff v. Starr Fire Ins. Co.*, 125 N. Y. 57; 21 Am. St. Rep. 721; and the company will be responsible for the acts of its agents' clerks, when it knew, or ought to have known, that other persons would be employed by and to act for the agents: *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76; 4 Am. St. Rep. 744. The act of the clerk is the act of the agent: *Arff v. Starr Fire Ins. Co.*, 125 N. Y. 57; 21 Am. St. Rep. 721; and the latter may delegate to the former, power to agree that a policy to be issued shall contain certain con-

ditions: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 121. Notice of additional insurance given to a subagent is ordinarily sufficient: *Arff v. Starr Fire Ins. Co.*, 125 N. Y. 57; 21 Am. St. Rep. 721.

Municipal Corporations.—Wherever judgment and discretion are to be exercised by a municipal corporation, the body or officer intrusted with the duty must exercise it. It cannot be delegated or “farmed out.” Discretionary powers, which are granted to one person or body, cannot, by that person or body, without leave, be delegated to another: *State v. Fiske*, 9 R. I. 94; *Thomson v. Boonville*, 61 Mo. 282; *Matthews v. Alexandria*, 68 Mo. 115; 30 Am. Rep. 776; *Ruggles v. Collier*, 43 Mo. 353; *State v. Paterson*, 34 N. J. L. 168; *Jackson County v. Brush*, 77 Ill. 59; *Hydes v. Joyes*, 4 Bush, 464; 96 Am. Dec. 311; *Thompson v. Schermerhorn*, 6 N. Y. 92; 55 Am. Dec. 385; *Brooklyn v. Breslin*, 57 N. Y. 591; *Davis v. Read*, 65 N. Y. 566; *Birdsall v. Clark*, 73 N. Y. 73; 29 Am. Rep. 105; *Oakland v. Carpentier*, 13 Cal. 540; *Meuser v. Risdon*, 36 Cal. 239; *Whyte v. Mayor of Nashville*, 2 Swan, 364; *Lauenstein v. Fond du Lac*, 28 Wis. 336; *Lord v. Oconto*, 47 Wis. 386; *Gale v. Kalamazoo*, 23 Mich. 343; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *State v. Bell*, 34 Ohio St. 194; *Locke’s Appeal*, 72 Pa. St. 491; 13 Am. Rep. 716; *St. Louis v. Clemens*, 43 Mo. 395.

Thus a city, authorized by its charter to erect, repair, and regulate public wharves, and to fix the rate of wharfage thereat, cannot lease its wharf, or farm out its revenues, or empower anyone else to fix the rates of wharfage; and a contract whereby the city undertakes to do these things is void: *Matthews v. Alexandria*, 68 Mo. 115; 30 Am. Rep. 776; *Lord v. Oconto*, 47 Wis. 386. A city cannot delegate its power to repave streets to the mayor. Cases where Congress has delegated its powers to the President bear no analogy to those where a city council delegates powers to a mayor. In the one case, by every rule of construction, the corporation is confined within the limits of its chartered powers. In the other case, the government is invested with the attributes of sovereignty, and always has resorted, and must resort, to many things lying within the vast domain of implied power: *Ruggles v. Collier*, 43 Mo. 353. A mayor, however, may exercise a power which the charter expressly authorizes him to exercise: *Brooklyn v. Breslin*, 57 N. Y. 591. Where the statute imposes the duty upon the mayor and aldermen to select sites for public markets, the architect, and plans, they are required to use judgment and discretion in determining the suitability of the sites, and also of the architect, engineer, and other persons employed to accomplish the purpose. This they must exercise, and cannot delegate their authority to others without express legislative authority: *State v. Paterson*, 34 N. J. L. 163. The apportionment of a tax made by a city clerk, in pursuance of a resolution of the common council, is, in the absence of a confirmation thereof by the city council, invalid, and a sale of land to collect an unpaid tax so levied is void: *Davis v. Read*, 65 N. Y. 566. The board of supervisors of the city of San Francisco cannot, by resolution, transfer its appropriate functions to its clerk: *Meuser v. Risdon*, 36 Cal. 239. The board of education and common council of a city cannot delegate the power of purchasing a schoolhouse site to a board of commissioners of said city, without an express grant from the legislature of authority to do so: *Lauenstein v. Fond du Lac*, 28 Wis. 336. The statutory authority conferred upon boards of supervisors to regulate the bridging of navigable streams, is a trust that must be executed by themselves. They cannot delegate it to others, especially to parties concerned in any details requiring the exercise of their judgment, such as the location or character of the bridge: *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453. But the agents of a town, appointed to prosecute a suit, have general authority to conduct the suit, unless restricted by the town as to the manner of executing their trust. A vote to choose agents, and a choice in conformity thereto, are equivalent to a full power of attorney. Agents thus appointed have the power of substitution or delegation, so far as to appoint

attorneys and employ counsel, who, when they have become such of record, have the same power, in relation to anything to be done in the progress of the suit, as the agents themselves; and an authority to prosecute or defend a suit implies a power to refer it by rule of court, that being a legal mode of prosecuting or defending: *Buckland v. Conway*, 16 Mass. 396.

Private Corporations.—The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds toward his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former, and, if the power of substitution is not conferred in the appointment, it cannot exist at all. But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated: *Hoyt v. Thompson*, 19 N. Y. 207, 216; *Burrill v. Nahant Bank*, 2 Met. 163, 167; 35 Am. Dec. 395. The implied powers of corporations, therefore, to appoint subagents and other subordinates, not being germane to the subject under consideration, we leave it, with a statement that this subject is clearly discussed in *Morawetz on Private Corporations*, 2d ed., secs. 534–536.

Public Trusts.—The discretionary or fiduciary powers conferred by law upon such persons as executors, guardians, public trustees, and the like, cannot be delegated without express authority: *Inhabitants of Stoughton v. Baker*, 4 Mass. 522; 3 Am. Dec. 236; *The California*, 1 Saw. 603; *Merrill v. Farmers' etc. Co.*, 24 Hun, 297; *Lyon v. Jerome*, 26 Wend. 485; 37 Am. Dec. 271; *Berger v. Duff*, 4 Johns. Ch. 368; *Newton v. Bronson*, 13 N. Y. 587; 67 Am. Dec. 89; *Hicks v. Dorn*, 42 N. Y. 47, 51; *St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 258. Thus, the power given by statute to pilot commissioners to examine pilots and grant or refuse them licenses is a public trust committed to them and each of them, which cannot be delegated to third persons: *The California*, 1 Saw. 596, 603. The authority conferred by statute upon canal commissioners to enter upon and take possession of lands of an individual for the construction of, or for the temporary use of, the canals, cannot be delegated, unless there is special power of substitution: *St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 258. So an executor or other trustee, empowered to sell lands in his discretion, cannot authorize an agent to contract for their sale. The power is a personal trust which cannot be delegated, and a contract by a subagent is void: *Newton v. Bronson*, 13 N. Y. 587; 67 Am. Dec. 89. An executor cannot sell by attorney: *Berger v. Duff*, 4 Johns. Ch. 368.

Subagent's Authority.—An agent may appoint a subagent to do acts in the course of the agency which do not call for the exercise of judgment or discretion, and which are purely executive or ministerial, and the principal is bound by the acts of such agent: *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178. He may employ a subagent to find a purchaser for land, and a sale by the subagent will bind the owners: *Renwick v. Bancroft*, 56 Iowa, 527. If the duty of the agent is to point out land which the principal desires to sell, and a subagent, selected by the agent, directs a third person to point out lands which the subagent knows are not the lands of the principal, the latter is bound by the wrongful act of the subagent, and must restore the consideration paid for the conveyance of the land, when such consideration was paid under the belief that the lands conveyed were the same as those pointed out: *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178.

Ordinarily, an agent can do for his principal only that which his principal authorizes, and, of course, a subagent cannot do that which a principal has not authorized his agent to do: *Furnas v. Frankman*, 6 Neb. 429. A subagent, without authority, could not make a promissory note binding on the principal; but a subagent appointed to purchase stock and sell goods for a company may buy on credit, if not prohibited, and the company will be bound by such purchase: *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237; 7 Am. Dec. 68. A notice to quit, given by an agent of an agent, is not sufficient, without a recognition by the principal.

Doe v. Robinson, 8 Bing., N. O., 677. A private understanding between a principal and his general agent, by which the latter is, himself, to pay subagents for their services, does not bind them, if they have no notice of it: **Furnas v. Frankman**, 6 Neb. 429. An agent employed to sell a commodity in a given state, or in several given states, at a fixed percentage on the amount of sales, with a stipulation in the contract that he is to pay all his own expenses, has no authority, merely by virtue of his power as agent, to employ others, at the expense of the company, either to act as subagents, or to advertise and commend the commodity in a particular locality or to a particular community. Persons employed by him for such service must look to him for compensation, and cannot charge the company with the same without its consent: **National Cash Register Co. v. Ison**, 94 Ga. 463.

A subagent's authority necessarily ceases upon the death of the principal: **Peries v. Aycinena**, 3 Watts & S. 64, 79; and it has been held that the death of the agent revokes the authority of the subagent: **Lehigh Coal etc. Co. v. Mohr**, 83 Pa. St. 228; 24 Am. Rep. 161. If the agent has power to revoke his appointment at pleasure, his death would, of course, necessarily revoke the power of the subagent: **Watt v. Watt**, 2 Barb. Ch. 371; so, if the subagent is appointed by the agent without the knowledge or consent of the principal, the subagent's authority would be revoked by the death of the agent: **Jackson Ins. Co. v. Partee**, 9 Heisk. 296; but the authority of a subagent emanating from the principal, is not affected by the death of the agent from whom he received his appointment: **Smith v. White**, 5 Dana, 376. Where a general insurance agent permits his subagents to receive premiums from, and to fill up and deliver policies to, the insured, the acts of the subagent are regarded as the acts of the general agent, and persons dealing with such subagent have a right to judge of the extent of his authority by the nature of the business intrusted to him: **Grubbs v. North Carolina Home Ins. Co.**, 108 N. C. 472; 23 Am. St. Rep. 62. A waiver which the general agent of an insurance company may make may be made by his clerk: **Arff v. Starr Fire Ins. Co.**, 125 N. Y. 57; 21 Am. St. Rep. 721; **Grubbs v. North Carolina etc. Ins. Co.**, 108 N. C. 472; 23 Am. St. Rep. 62; contra, **Waldman v. North British etc. Ins. Co.**, 91 Ala. 170; 24 Am. St. Rep. 883.

Notice—Ratification.—A principal is, in law, chargeable with notice of the acts of his subagent, whom his general agent had authority to appoint, and did so appoint: **Boyd v. Vanderkemp**, 1 Barb. Ch. 273, 287. But the rule is different where the subagent is simply the agent of his immediate employer. Thus, an account, or money demand, having been delivered by its owners to a collection agency with instructions to collect the debt, that agency transmitted the claim to an attorney, who, knowing of the insolvency of the debtor, persuaded him to confess judgment. The money collected was transmitted to the collection agency, but never reached the creditors. Proceedings in bankruptcy were instituted against the debtor within four months after such confession, and were prosecuted to a decree. Hence, the attorney being the agent only of the collection agency which employed him, and not of the creditors, his knowledge of the insolvency of the debtor was held not to be chargeable to them in such a sense as to render them liable to the assignee in bankruptcy for the money collected on the judgment: **Hoover v. Wise**, 91 U. S. 308. Where an agent has power to employ a subagent, the acts of the subagent, or notice given to him in the transaction of the business, have the same effect as if done or received by the principal: **Hoover v. Wise**, 91 U. S. 308, 310.

The principal may ratify the acts of his agent done through subagents and thereby become entitled to the same rights, and be subject to the same liabilities, as if the acts were done by his immediate agents: **Gaines v. Miller**, 111 U. S. 395; **Saveland v. Green**, 40 Wis. 431, 443, **Barret v. Rhem**, 6 Bush, 466; **Mayer v. McLure**, 36 Miss. 389; 72 Am. Dec. 190.

Duties, Rights, and Liabilities.—Where one in possession of trust property is the mere agent of a trustee authorized to receive it, the agent is liable to account to his principal, the trustee, but the trustee himself is the person who must account for the trust: *Attorney General v. Earl of Chesterfield*, 18 Beav. 596. A factor who receives goods, and, in his own name, shifts them to another market to be sold by a subagent, cannot collect the proceeds against the will of the owner. After the sale, the subagent is the debtor, and not the trustee, of the principal: *Jackson Ins. Co. v. Partee*, 9 Heisk. 296. As a general rule, insurance brokers have a lien upon all policies in their hands, procured by them for their principals, for the payment of the sums due to them for commissions, disbursements, advances, and services concerning the same. It is also a general rule, that where agents employ subagents in the business of the agency, the latter are clothed with the same rights, incur the same obligations, and are bound to the same duties in regard to their immediate employers, as if they were the sole and real principals: *McKenzie v. Nevins*, 22 Me. 138; 38 Am. Dec. 291. So, too, "a subagent employed by an agent, to do a particular act of agency without the privity or consent of the principal, may acquire, also, a lien upon the property thus coming into his possession against the principal, for his commissions, advances, and liabilities thereon, if the principal adopts his acts, or seeks to avail himself of the property or proceeds acquired in the usual course of his subagency. He will be at liberty to avail himself of his general lien against the principal to the extent of the lien, particular or general, which the agent himself has against the principal, by way of substitution to the rights of the agent": *McKenzie v. Nevins*, 22 Me. 138; 38 Am. Dec. 299, citing and quoting *Story on Agency*, sec. 389. If one employs another to effect a policy of life insurance for the former's benefit, and the latter, without the former's knowledge, employs a subagent to effect the policy, representing himself as the principal, the subagent has a lien on the policy, as against the original principal, for the general balance due to him from the agent: *Westwood v. Bell*, 4 Camp. 349; *Mann v. Forester*, 4 Camp. 60. But, if a broker, in such cases, acts with a party, having notice or knowledge that he is an agent for a third person, and not dealing on his own account, he has no right, as between himself and the principal, to a lien on the policy effected, for his general balance against such agent: *Maanss v. Henderson*, 1 East, 335; *Mau v. Shiffner*, 2 East, 523; *Mann v. Forester*, 4 Camp. 60. Neither the agent nor the subagent has a lien upon the policy of insurance for the payment of the balance of his general account, embracing items wholly disconnected from the business of the agency: *McKenzie v. Nevins*, 22 Me. 138; 38 Am. Dec. 291. The principal is liable to third persons, in a civil suit for frauds, or misfeasances, or neglect of duty in his agent, or in those whom his agent employs, though the principal did not authorize or assent to it: *Mayer v. McLure*, 36 Miss. 389; 72 Am. Dec. 190.

When authority to employ a substitute exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself: *De Bussche v. Alt*, 8 Ch. Div. 286, 311; *Commercial Bank v. Jones*, 18 Tex. 811.

An agent is not responsible for the negligence, omissions, or misconduct of a subagent, where, in the course and from the nature of the business, it becomes necessary to employ subagents, by reason of their particular profession or skill, or where the appointment of a subagent has been authorized, if the agent has used reasonable diligence and skill in his choice of the subagent: *Commercial Bank v. Martin*, 1 La. Ann. 344; 45 Am. Dec. 87; *Dorchester etc. Bank v. New England Bank*, 1 Ousb. 177; *Tiernan v. Commercial Bank*, 7 How. 648; 40 Am. Dec. 83; *Sanger v. Dun*, 47 Wis. 615; 32 Am. Rep. 789; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13; 45 Am. Dec. 72; *Speight v. Gaunt*, 9 App. Cas. 1, 29; *Darling v. Stanwood*, 14 Allen, 504; *Loomis v. Simpson*, 13

Iowa, 532. In such cases, the subagent is responsible to the principal for his own negligence and misconduct: *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13; 45 Am. Dec. 72; *McCants v. Wells*, 4 S. C. 381. So a general agent, for the sale of lands, is not responsible for the nonperformance of a contract, made by an authorized subagent, without his knowledge: *Boyd v. Vanderkemp*, 1 Barb. Ch. 273. But, notwithstanding this general rule, agents have been held liable for the defaults of subagents: *Bradstreet v. Everson*, 72 Pa. St. 124; 13 Am. Rep. 665.

"The principle," says Field, J., in *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443, "which runs through the cases is, that if an agent employs a subagent for his principal, and by his authority, express or implied, then the subagent is the agent of the principal, and is directly responsible to the principal for his conduct, and, so far as damage results from the conduct of the subagent, the agent is only responsible for a want of due care in selecting the subagent; but if the agent, having undertaken to do the business of his principal, employs a servant or agent on his own account to assist him in what he has undertaken, such a subagent is an agent of the agent, and is responsible to the agent for his conduct, and the agent is responsible to the principal for the manner in which the business has been done, whether by himself or by his servant or agent." The law laid down in *Campbell v. Reeves*, 3 Head, 226, and *Strong v. Stewart*, 9 Heisk. 137, is, that whenever the authority to appoint a subagent exists, a privity is created between the principal and such subagent, and the latter will be held directly responsible to the principal. But if no such privity exists, the subagent is responsible to his immediate employer, and the remedy of the principal is against his agent. Authority to appoint a subagent creates a privity between the principal and such subagent to the exact extent of authority vested in him; and this privity is destroyed by any abuse of the original authority: *Strong v. Stewart*, 9 Heisk. 137. Third persons, who deal with a subagent as one having authority, have no right, as against the principal, to set up that the subagent is without authority to act for the benefit of the principal: *Mayer v. McLure*, 36 Miss. 389; 72 Am. Dec. 190. And third persons cannot maintain an action against an agent for damage done by the negligence of subagents employed in the service of the principal. The principal only, or "the hand committing the injury," is liable: *Stone v. Cartwright*, 6 Term Rep. 648; *Bush v. Steinman*, 1 Bos. & P. 404; *Quarman v. Burnett*, 6 Mees. & W. 499; *Rapeon v. Cubitt*, 9 Mees. & W. 709; *Bamford v. Shuttleworth*, 11 Q. B. 926; *Denison v. Seymour*, 9 Wend. 11. In a note to the case last cited, it is said, that the immediate employer of the agent through whose negligence an injury occurs is the person responsible for the negligence of such agent. An agent who conceals his principal is liable as principal. Thus, in an action against one for an injury resulting from his negligence in furnishing the plaintiff, a workman, with a defective chain, the fact that the defendant was an agent of a third person is no defense, if the plaintiff was not aware of the existence of such agency until after his cause of action accrued: *Malone v. Morton*, 84 Mo. 436.

Public Agents are not responsible for the omissions, negligence, or misfeasance of those employed under them, if they have employed trustworthy persons of suitable skill and ability, and have not co-operated in the wrong. Thus, mail contractors are public agents, and not responsible for a letter containing money, lost by the carelessness of their agent who carried the mail: *Conwell v. Voorhees*, 13 Ohio, 523; 42 Am. Dec. 206. The monographic note to this case, discussing the liability of mail contractors for the acts of their subalterns, shows, however, that the authorities upon this question are not uniform.

With respect to the liability of principals, it has been held that an insurance company is responsible not only for acts of its agents within the scope of their agency, but also for the acts of the agents' clerks, when the company knew, or ought to have known, that other persons would be employed by, and to act for, the agents: *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76; 4 Am. St. Rep. 744.

When one places negotiable paper with a bank for collection, and that bank sends it to another for the same purpose, whether the second bank is to be considered the agent of the owner, or merely the agent of the bank, is a vexed question. Important legal consequences flow from its determination, and upon it the authorities are conflicting: See monographic notes to *Isham v. Post*, 38 Am. St. Rep. 775; *Allen v. Merchants' Bank*, 34 Am. Dec. 307-317; *Warren Bank v. Suffolk Bank*, 10 Cush. 582. If the second bank is agent of the owner, then it is responsible to him for any negligence resulting in a loss of the debt. So, if the collecting bank fails after receiving the money, though its credit was good at the time the paper was transmitted for collection, the bank which sent it is not liable to the owner for the amount collected. But if, as many authorities hold, the second indorser is to be considered merely the agent of his immediate indorser, and not of the first indorser, these consequences do not follow, and, in case of negligence or default, the first indorser is liable to the owner of the bill, and not the second: *Bank of Sherman v. Weiss*, 67 Tex. 333; 60 Am. Rep. 29. If it be good law that a principal cannot be called on to suffer any loss occasioned by the conduct of a subagent between whom and himself no privity exists (*Mackersy v. Ramsays*, 9 Clarke & F. 818), it would seem to follow that, if a subagent collects and refuses to pay over moneys belonging to the principal, or applies them to the satisfaction of a debt which the agent owes to the subagent, the owner or principal has no cause of action against the subagent, where no privity exists between the principal and subagent; and it has been so held: *Cobb v. Becke*, 6 Q. B. 930; *Hoover v. Wise*, 91 U. S. 308; *Stephens v. Badcock*, 3 Barn. & Ald. 354. Hence, according to this line of cases, if a bank, as a collection agency, receives paper for the purposes of collection, its position is that of "an independent contractor," and the instruments employed by it in the business contemplated are its agents, and not the subagents of the owner of the paper. Such subagents are not liable to the owner, and the owner has no remedy against them: *Hoover v. Wise*, 91 U. S. 308, 313; *Hyde v. First Nat. Bank*, 7 Biss. 156; *Wood v. Boylston Nat. Bank*, 129 Mass. 358; 37 Am. Rep. 366. On the other hand, however, it has been held that, if a subagent has money in his hands which rightfully belongs to the principal, the latter may sue for it in assumpsit and recover as for money had and received: *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561; 40 Am. Rep. 261; *Bank of Sherman v. Weiss*, 67 Tex. 331; 60 Am. Rep. 29; *First Nat. Bank v. Reno County Bank*, 3 Fed. Rep. 257; *Hall v. Marston*, 17 Mass. 575; *Gaines v. Miller*, 111 U. S. 395. The principle of these authorities is, that there are many cases in which assumpsit may be supported without any privity between the parties other than what is created by law. Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable ground for retaining it, the law creates the privity and the promise: *Hall v. Marston*, 17 Mass. 575, per Parker, C. J. It is only where, by express contract, or well-established course of dealing, the correspondent of a collecting bank becomes responsible for the collection, and cannot seek reimbursement or advances, in case of the nonpayment of the paper, that he can retain it or the proceeds of the collection as against the real owner: *Dickerson v. Wason*, 47 N. Y. 439; 7 Am. Rep. 455. The general rule that a subagent is not liable to the principal, because there is no privity between them, but only to the agent, is subject to the exceptions that an express authority to an agent to employ a subagent creates a privity between the principal and the subagent employed, thereby making the latter directly liable to such principal; and that the subagent is liable to the principal where, by the usages of trade, the agent employs a subagent: *Wilson v. Smith*, 8 How. 762, and note thereto. If a foreigner employs an agent to procure insurance on his vessel, and the agent employs a subagent for the purpose, and any lien he had has been removed by

payment, the owner may bring his action directly against the subagent, and recover money received by him on account of the policy: *McKenzie v. Nevins*, 22 Me. 138; 38 Am. Dec. 291.

A Subagent is Accountable Ordinarily only to his superior agent when employed without the assent or direction of the principal. But if he is employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts. There is, in such a case, a privity between the subagent and the principal, who must therefore seek a remedy directly against the subagent for his negligence or misconduct: *Guelich v. National State Bank*, 56 Iowa, 434; 41 Am. Rep. 110; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial etc. Bank v. Jones*, 18 Tex. 811. An agent of a factor is not liable to a third person for failing to transmit his orders to the principal of the agent as to the sale of cotton consigned by such third person to the factor: *Reid v. Humber*, 49 Ga. 207. An attorney at law, receiving a note "for collection," against parties residing in another county, is responsible for the embezzlement of the proceeds by another attorney to whom he intrusts the business of collection: *Cummins v. Heald*, 24 Kan. 600; 36 Am. Rep. 264, and note. A subagent may call upon the principal to pay him for services rendered: *Lincoln v. Battelle*, 6 Wend. 475. And if an agent has become responsible to his principal for the misconduct of a subagent, and has been compelled to pay the principal, he may recover from the subagent: *Pownall v. Bair*, 78 Pa. St. 403.

POMPONIO v. NEW YORK, NEW HAVEN, AND HARTFORD RIVER RAILROAD COMPANY.

[66 CONNECTICUT, 523.]

REAL PROPERTY—LICENSEES AND PERSONS INVITED. With respect to the safety of the premises of a landowner, he owes a more limited duty to a mere licensee than he does to a person who is there by invitation, either express or implied; but he owes to both the equal duty of not injuring either by his own active negligence, and is liable if he does so.

RAILROAD COMPANIES — LICENSEES AND PERSONS INVITED. A railroad company, which has for years maintained a planked crossing upon its tracks for the use of a manufacturing company having shops extending along either side of the railroad, is liable for its negligent act in switching its cars at the crossing, whereby a person, going to his work at one of the shops, after the noon intermission, is, without fault upon his part, struck and killed, whether he is upon the crossing as a licensee, or by implied invitation.

REAL PROPERTY—INVITATION—LICENSE.—A case of invitation to go upon premises exists where the privilege of user is for the common interest or mutual advantage of both parties, but if such privilege exists for the mere pleasure and benefit of the party exercising it, there is simply a case of license.

RAILROAD COMPANIES—IMPLIED INVITATION.—Workmen who, for the purposes of their employment, use a planked railroad crossing, which has been maintained for years for the use of a manufacturing company having shops extending along either side of the railroad track, are not mere licensees, but are there upon the implied invitation of the railroad company.

NEGLIGENCE—QUESTION OF FACT—REVIEW ON APPEAL.—All that the law requires of one about to pass over a rail-

road crossing, whether he is a trespasser or licensee, or there by implied invitation, is for him to use ordinary care to avoid danger and injury to himself. Whether he performs this duty to himself is a question of fact, the determination of which is not reviewable on appeal.

Action for damages for negligently causing the death of the plaintiff's intestate. The plaintiff recovered a judgment for three thousand seven hundred and fifty dollars, and the defendant appealed.

Stephen W. Kellogg and John P. Kellogg, for the appellant.

Charles G. Root, for the appellee.

532 TORRANCE, J. This is an action brought to recover damages for injuries claimed to have been inflicted by the defendant upon the plaintiff's intestate, causing his death. The court below, upon the facts found, rendered judgment for the plaintiff, and the defendant appealed.

The following is the substance of the finding: The intestate, Germaio Pomponio, was, when injured, working for Holmes, Booth & Hayden, a corporation, in Waterbury. The shops of said corporation are located upon both sides of the defendant's railroad, and extend for a considerable distance parallel with it. Germaio was employed in that portion of the works lying easterly of the tracks, and on the 30th of May, 1892, a few minutes before 1 o'clock in the afternoon, he was returning to his work, and in doing so, was passing over the tracks of the defendant's railroad, at a crossing leading from one of the streets in Waterbury to one of the two regular entrances to the easterly portion of the works of his employer. On both sides of this crossing was a wooden gate and a house for a gate-tender, belonging to, and maintained by, Holmes, Booth & Hayden. This crossing was regularly prepared for the purpose of access to said works, and was regularly used by three or four hundred of the employees in going to and from their work, as well as by teams and others having business with said corporation. It was the rule of said corporation that these employees should go through the gate at the easterly terminus of this crossing in going to, and returning from, their work. None others than said employees, and those having business with the corporation **533** were permitted to enter at said entrance, without a pass obtained from the office.

This crossing has been thus maintained and used for over thirty years, and said use has always been open, notorious, and well known to all the world, and to the defendant. During all

this period, the defendant has kept this crossing planked and in condition for travel to said shops, and the planking for such purpose has generally been furnished by the defendant, but at times by said corporation. The layout of defendant's road in 1848 antedated by a few years the erection of these shops and the establishment of this crossing.

It was well known to the defendant that at a few minutes before the morning starting, at the noon closing, the 1 P. M. starting, and the evening closing hours, the employees of said works passed in or out in large numbers over this crossing, while during the other hours of the day it was comparatively little used. South of the crossing were two sidetracks, used principally for the storage of cars for the shops. Thirty-four feet north of the crossing was the south end of an iron truss bridge of the defendant, over the Naugatuck river. It was one hundred and five and one-half feet long, its main trusses were twenty-four inches wide, its overhead supports were of iron, of the various sizes usual in such a bridge, and it was not otherwise inclosed.

The defendant was accustomed to switch over this crossing from its freight yard north of the bridge, in order to place its cars on the sidetracks south of the crossing. In switching cars upon the more northerly of the two sidings, flying switches were customarily made. This switching could only be done during the intervals between the passing of regular trains, and one of these intervals was between 11:15 A. M. and 1:10 P. M. At the time Germaio was injured, the defendant was making a flying switch over this crossing, in order to put a box-car from the freight yard onto one of the two sidetracks south of the crossing. Said car, having been got under headway, was, near the north end of the bridge, cut off from the engine, which then sped on, at about twelve or fifteen miles an hour, until it passed the crossing, and the switch about one hundred and fifty feet south of the crossing. ⁵³⁴ Upon the engine were the engineer and fireman in the cab, the yard conductor on the forward footboard, and two brakemen on the rear footboard of the tender. Upon the box-car, which followed some distance behind, and which was upon the bridge when the engine passed the crossing, was a single brakeman, on top of the car at the rear, where the brake was. As the engine approached the crossing, the whistle was blown and the bell rung, and Germaio and Loughlin, a fellow workman, observed its approach, and halted for it to pass at a distance of between six and fifteen feet from the tracks. After it had passed, Loughlin looked up and down the track. He did

not see the car coming, being prevented from doing so, either by the bridge or by escaping steam, smoke, or flying dust, or both combined, and proceeded on his way. Germaio advanced at the same time. As they were upon the planking between the tracks, the silently advancing car, going at the rate of from six to eight miles an hour, struck both Loughlin and Germaio, causing the latter the injuries from which he died a few days later.

It did not appear in evidence that anyone observed, or was in a position to observe, Germaio, to see whether or not he looked up the track before starting to cross, after the engine passed, and there was no direct evidence upon this point. As the engine passed the deceased, none of the men upon it gave any warning of the approaching car, or did anything to attract his attention to it. When the brakeman upon the box-car saw that an accident was imminent, he shouted, but was not heard by the crossers, as the circumstances rendered it little probable that he would be, or that, if heard, the intended warning would be of any avail. He also began to apply the brake, but with no effect in diminishing the speed of the car until the accident occurred.

When Germaio started across the tracks, after the engine passed him, the box-car was somewhere on the bridge, and it was more or less concealed from his view by the bridge. From any point in the line of said crossing, between defendant's west rail and the gate house, the view to the northward was unobstructed, save by the bridge, and, standing in said ⁵³⁵ line within a distance of five feet from said rail, one had a clear view through the bridge. Between six and eight or nine feet from said rail, the trusses and supports of the bridge seriously interfered with the view of objects on the bridge, so that a box-car upon it "would be largely obscured from sight." At no point, however, would such a car be wholly hidden from sight.

The finding concludes thus: "I find from the evidence as follows: (a) That the deceased was upon the crossing at the time of the accident by the implied invitation of the defendant; (b) That the defendant failed to exercise due and reasonable care toward the deceased in the premises, and was negligent toward him, whereby he received his injuries; (c) That the defendant failed in its duty to the deceased, and did not exercise reasonable care for his safety under the circumstances, although he was upon said crossing as a mere licensee only, and that the defendant was, therefore, guilty of negligence, directly causing said injuries to the deceased; (d) That the deceased did not, at the time of the accident, fail to make reasonable use of his senses,

and did not, by such failure, or otherwise, in any manner, by his own negligence or want of care, contribute to his injury."

Upon the trial below, the defendant claimed that the deceased was upon the crossing as a mere licensee; that the defendant at the time owed to him no duty as such licensee; that the defendant was not guilty of negligence; that the deceased was guilty of contributory negligence; and that judgment should be rendered for nominal damages only. The court rendered judgment for substantial damages.

The defendant claims that the court below, upon the facts found, erred in holding it guilty of negligence toward the decedent, and also in holding that the decedent was not guilty of contributory negligence. We think the question involved in this last claim, as to contributory negligence of the decedent, is disposed of by the finding as one of fact, and is not open to review upon this appeal.

The general question whether the decedent was guilty of contributory negligence, involves these two subordinate questions:
536 1. What was the nature and extent of the duty to avoid injury resting upon the decedent under the circumstances? 2. Did he fully perform that duty? The first question is one of law, and is answered by saying that whether the decedent was upon the crossing as a trespasser, or a licensee, or was there by implied invitation, it was his duty to use such measures to avoid danger and injury to himself as a man of ordinary prudence would have used under the same circumstances; and this was all the law required of him. The other question whether his conduct in avoiding the dangers incident to his situation was that of a man of ordinary prudence, is clearly a question of fact, to be answered by the trier from the facts proved by the evidence. The conclusion of the trier upon this point, if he committed no error of law in reaching it, is final, and cannot be reviewed by this court upon this appeal: *Farrell v. Waterbury Horse R. R. Co.*, 60 Conn. 239.

Now, the claim of the defendant, that the court below erred in holding that the decedent was not guilty of contributory negligence, may mean that the court erred with reference to this question of law, or this question of fact, or both. But the record does not disclose that the court erred with reference to either question. It nowhere appears that it took an erroneous view of the nature or extent of the decedent's duty, or that it held him to a duty less in any degree than the law imposed on him; and it nowhere appears that, in coming to the conclusion

that he had fully performed his duty, the court below committed any error of law. Upon this part of the case, then, the record fails to show that the court below committed any error of law; and this disposes of the defendant's claim upon the question of contributory negligence.

The next question is whether the court erred in holding that the defendant was guilty of negligence toward the decedent. Upon this part of the case, the questions relate principally to the nature and extent of the defendant's duty toward the decedent, rather than to its performance of that duty; and the extent of the duty, it is said, depends largely ⁵⁸⁷ upon the relation which the parties sustained to each other at the time; that is, whether the decedent was upon the crossing as a licensee, or was there upon the implied invitation of the defendant; and these questions are, upon this record, properly questions of law.

The principle upon which the courts distinguish a case of implied license from one of implied invitation, in the technical sense, seems to be this: Speaking generally, where the privilege of user exists for the common interest or mutual advantage of both parties, it will be held to be a case of invitation; but if it exists for the mere pleasure and benefit of the party exercising the privilege, it will be held to be a case of license: Beach on Contributory Negligence, sec. 51; Campbell on Negligence, secs. 43, 44. "It is sometimes difficult to determine whether the circumstances make a case of invitation, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license": Bennett v. Railroad Co., 102 U. S. 577, 584.

The defendant contends that the decedent was upon the crossing as a mere licensee, and, consequently, that its duty toward him was a more limited one than if he had been there upon its implied invitation. As a general statement, it is undoubtedly true that an owner in charge of land owes a more limited duty to a mere licensee than he does to a party invited, in the technical sense of that word. A licensee must take the premises as he finds them, and the owner is not, as to him, bound to use care and diligence to keep the premises safe while he does owe such a duty to one using his premises upon invitation. "It has often been held that the owner of land or a building, who has it in charge, is bound to be careful and diligent in keeping it safe for those who came there by his invitation, express or implied, but that he owes no such duty to those who come there for their own convenience, or as mere licensees": Plummer v. Dill, 156 Mass.

426, 427; 32 Am. St. Rep. 463. This distinction between the case of a licensee and that of a party invited, in respect to the duty of keeping the premises safe for their use, is recognized in the following cases and in many others: *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525, 532; *Barry v. New York etc. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377; *Byrne v. New York etc. R. R. Co.*, 104 N. Y. 362; 58 Am. Rep. 512; *Sweeny v. Old Colony etc., R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; *Gordon v. Cummings*, 152 Mass. 513; 23 Am. St. Rep. 846.

But while this is so, it is also true that the landowner must not himself, by what has been called "his own active negligence," injure either the licensee or the party invited, while they are upon his land. This is a duty due to both equally. Toward both, in this respect, he is bound to exercise the same amount of care. Both are upon his premises, not as wrongdoers, but by his permission, and, in respect to the duty in question, we know of no good reason why the nature and extent of it should not be the same in cases of license as in cases of invitation. In a Massachusetts case it appeared that the plaintiff, being sent by his mother upon an errand, passed through a passageway upon the defendant's premises, over a portion of which way a roof had been constructed; and that it was the defendant's habit to supply ale to their workmen, who were accustomed to throw the empty ale kegs out of a window down upon this roof, from which from time to time the kegs were taken away. Just as the plaintiff, in going through the passageway, emerged from under this roof, one of the workmen threw a keg so carelessly that it fell off the roof and injured the plaintiff. It was held that the defendants were liable, and that it made no difference whether the way was public, and thus the plaintiff was traveling upon it as a matter of right, or whether it was private and he was traveling upon it merely by permission. The court said: "Even if he were there under a permission which they might at any time revoke, and under circumstances which did not make them responsible for any defect in the existing condition of the way, they were still liable for any negligent act of themselves or their servants which increased the danger of passing and, in fact, injured him": *Corrigan v. Union Sugar Refinery*, 98 Mass. 577; 96 Am. Dec. 685.

In another Massachusetts case the court says: "The licensor has, however, no right to create a new danger while the license continues: *Oliver v. Worcester*, 102 Mass. 489, 502; 3 Am. Rep. 485; *Corrigan v. Union Sugar Refinery*, 98 Mass. 577; 96 Am.

Dec. 685; Corby v. ⁵³⁹ Hill, 4 Com. B., N. S., 556. So a railroad company, which allows the public habitually to use a private crossing of its tracks, cannot use active force against a person or vehicle crossing under a license, express or implied": Stevens v. Nichols, 155 Mass. 472, 475.

In a New York case the court said: "There can be no doubt that the acquiescence of the defendant, for so long a time, in the crossing of the tracks by pedestrians, amounted to license and permission, by the defendant, to all persons to cross the tracks at this point. These circumstances imposed a duty upon the defendant, in respect of persons using this crossing to exercise reasonable care in the movement of its trains. The company had a lawful right to use the tracks for its business, and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but so long as it permitted the public use, it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to use such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury. . . . The ground of liability in this case is negligence, and the duty of the defendant to exercise reasonable care existed irrespective of the fact whether the plaintiff's intestate had a fixed legal right to cross the track, or was there simply by the defendant's implied permission": Barry v. New York etc. R. R. Co., 92 N. Y. 289, 293; 44 Am. Rep. 377.

In this view of the matter, we think it makes no difference whether we hold the case at bar to be one of license or invitation; for the duty which the defendant is here charged with violating is not the duty to keep its premises safe for use, but the duty of using due care not to injure, by its own act, those rightfully on its premises; and that duty is the same, whether those persons are on the premises as licensees or upon invitation, in the technical sense of that word.

Furthermore, upon the somewhat peculiar and exceptional state of facts disclosed by the record, we think this is a case of invitation, as that word is used in many of the cases, as pointed out in Plummer v. Dill, 156 Mass. 426, 430; 32 Am. St. Rep. 463. In ⁵⁴⁰ that case the court says: "There is a class of cases to which Sweeny v. Old Colony etc. R. R. Co., 10 Allen, 368, 87 Am. Dec. 644, and Holmes v. Drew, 151 Mass. 578, belong, which stand on a ground peculiar to themselves. They are where the defendant, by his conduct, has induced the public to

use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The inducement, or implied invitation. In these cases, is not to come to a place of business fitted up by the defendant for traffic, to which those only are invited who will come to do business with the occupant, nor is it to come by permission, or favor, or license, but it is to come as one of the public and enjoy a public right, in the enjoyment of which one may expect to be protected. The liability in such a case should be coextensive with the inducement or implied invitation."

We think the case at bar, quoad these workpeople using this crossing at the stated hours, is a case of invitation, rather than of license, within the principle laid down in the above case of *Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463, and the cases therein referred to, and in other cases which might be cited: See, also, our own case of *Croghan v. Schiele*, 53 Conn. 186; 55 Am. Rep. 88. But, after all, whether the decedent is to be regarded as a licensee, or as one invited to use the crossing, is of no practical importance in this case; he was certainly either the one or the other, and the defendant's duty towards him, so far as the present complaint is concerned, was the same in either case; and, upon the facts found, we think the court below was justified in holding that the defendant failed to perform that duty.

As before intimated, the facts in this case are somewhat peculiar and exceptional. For more than thirty years the defendant has kept this crossing planked and in condition for the use of these three or four hundred workpeople, and for the teams of their employer; it was specially prepared and adapted for this purpose, and, practically speaking, the employees were compelled to use it in coming to and going from their work; it was used during every working day by three or four hundred people; it adjoined a public street, and it was the principal, and practically the only, entry to the ⁵⁴¹ shops east of the tracks; it was used by these people in crowds at a time at certain stated hours of the day; and all this was well known to the defendant and its servants; the decedent was one of these workmen, and when he was injured he was using the crossing in returning to his work at one of the stated times when it was customary for the employees to use the crossing for such purpose; the defendant was engaged in making what is known as a "flying switch," a dangerous operation anywhere, but more especially over a crossing, public or private; and it selected an hour to do this when it might reasonably be anticipated that it would result in injury

to some of these people, unless care proportionate to the danger was taken to avoid such a result.

Under these circumstances, the defendant was clearly charged with the duty to use reasonable care towards those using this crossing, whether they used it under a license or under an implied invitation—a care proportionate to the danger to be reasonably anticipated from the act done, and reasonably adequate, under the circumstances, to prevent injury from that act to those who at that time would probably be rightfully using the crossing: *Taylor v. Delaware etc. R. R. Co.*, 113 Pa. St. 162; 57 Am. Rep. 446; *Barry v. New York etc. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377; *Byrne v. New York etc. R. R. Co.*, 104 Pa. St. 362; 58 Am. Rep. 512.

Whether the defendant, at this time, used such care, was, in this case, as it ordinarily must be, a question to be determined by the trier as one of fact. The trier decided it against the defendant, and the record does not disclose that in deciding it any error of law was committed, either with respect to the relation which these parties sustained towards each other, or as to the duties which they owed to each other, or as to any other matter.

There is no error.

In this opinion the other judges concurred.

REAL PROPERTY—LICENSEES AND PERSONS INVITED.— To a mere licensee on the premises of another, the latter owes no duty, other than that of not willfully or wantonly injuring him. The license must be accepted subject to the risks and perils attendant thereon. A licensee upon the premises of a railway corporation is one who, being neither a passenger, servant, nor trespasser, nor standing in any contractual relations to the corporation, is permitted by it to come upon the premises for his own interest, convenience, or gratification: *Woolwine v. Chesapeake etc. Ry. Co.*, 36 W. Va. 329; 32 Am. St. Rep. 859. On the other hand, the owner of premises must keep them safe for those who come there by his invitation, express or implied: *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644. The distinction between an invitation and a license to go upon the premises of another appears to be that the former is inferred where there is a common interest or mutual advantage, and the latter, where the object is the mere pleasure or benefit of the person using it: *Benson v. Baltimore Traction Co.*, 77 Md. 535; 39 Am. St. Rep. 436. A railroad company which allows the public habitually to use a private crossing of its tracks cannot use active force against a person or vehicle crossing under a license, express or implied: See monographic note to *Redigan v. Boston etc. R. R.*, 155 Mass. 44; 31 Am. St. Rep. 520, on owner's liability to persons coming on his premises.

APPEAL.—REVIEW OF FINDINGS.— A finding of fact made by a jury or trial judge will not be disturbed by the appellate court, if it is supported by competent evidence: *Edwards v. Reid*, 39 Neb. 645; 42 Am. St. Rep. 607.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

CAMPBELL v. PEOPLE.

[159 ILLINOIS, 9.]

CRIMINAL LAW.—THE CORPUS DELICTI IN MURDER consists of two elements, viz: the death and the criminal agency of another in causing it.

CORPUS DELICTI.—CIRCUMSTANTIAL EVIDENCE may be sufficient to establish the fact of death in prosecutions for murder, as well as all the other elements of corpus delicti.

THE TESTIMONY OF AN ACCOMPLICE, though uncorroborated, may be sufficient to sustain a conviction for murder, but, in such cases, the trial court should proceed with the greatest caution.

THE TESTIMONY OF AN ACCOMPLICE is not sufficient to sustain a conviction for the alleged murder of her child, if it appears that she is an ignorant and depraved woman, having no conception of the nature of an oath or of the punishment to which she might be subjected for testifying falsely, that she was herself accused of the murder, that she felt aggrieved by the marriage of the defendant to another, and that she had made statements out of court inconsistent with the defendant's guilt, and had, in her testimony, been contradicted in some respects by several other witnesses.

Indictment and prosecution of John Campbell and Nancy Cook for the murder of her infant child. She testified that she had become pregnant by the defendant, and that, on threatening him with legal prosecution, he had told her that if she would not pester him when the child was born, she should not be bothered with it; that when it was born he came into the room, raised up the bed covering, and took the child away, and that she had never heard of it afterward. The other testimony is sufficiently apparent from the opinion of the court. The defendant, having been convicted, prosecuted a writ of error.

T. B. Steele, for the plaintiff in error.

Maurice T. Moloney, attorney general, T. J. Scofield, and M. L. Newell, of counsel, and Isaac H. Webb, state's attorney, for the people.

¹⁸ CARTER, J. As will be seen from the statement of the case, no direct or positive evidence was produced showing that the child of Nancy Cook was dead, or, if dead, that its death was caused by the criminal agency of plaintiff in error. If Nancy Cook's testimony be taken as true, the child, though of premature birth, was born alive. She testified that she felt it move and heard it cry; that it moved again when plaintiff in error cut the cord. Whether it survived that operation or not the evidence is silent. But she testified that he was the father of the child, and had told her that if she would not pester him he would take the child where she would never be bothered with it or see it again; that he cut the cord and wrapped the child in the piece of quilt on which it was born, took it away, carried it out of doors between 10 and 11 o'clock at ¹⁹ night, and returned in about half an hour afterward without it; that she never saw the child when it was born, nor had she seen it since; that she did not know what he did with it, nor whether it was dead or alive; that he never gave any account of it; that she had no conversation with him about it, and could never get a secret talk with him afterward. Search was afterward made about the premises, by others, but no trace of the child or of its remains was ever found. As a witness in his own behalf, he denied all of the incriminating testimony given by her, and his testimony was, in some of its most material parts, corroborated by the testimony of other witnesses. But the weight of the evidence will be discussed at another place.

Counsel for plaintiff in error contends, in the first place, that if it be taken as true that the accused did all that the prosecuting witness testified that he did do, the conviction must fail for lack of sufficient proof of the corpus delicti. It has been said that in murder the corpus delicti consists of two elements, viz., the fact of death, and the criminal agency of another as the cause of the death: *Ruloff v. People*, 18 N. Y. 179; 4 Am. & Eng. Ency. of Law, 309. Counsel concedes that the identity of the deceased and of the accused may be proved by circumstantial evidence, or that, when the fact of the death of the person alleged to have been murdered is properly established, the criminal agency of the accused may be shown by any competent evi-

dence, whether direct or circumstantial, but it is insisted that the fact of death must be established by direct or positive evidence, and cannot be established by indirect or circumstantial evidence. It is contended that this was the rule at common law, and is therefore the rule in this state. It is conceded on behalf of the people that this was the general rule at common law, but it is insisted that the rule was subject to exceptions, and that the rule itself has been modified and changed by the later authorities, and that now, by the great weight of modern ²⁰ authority, it is established that the corpus delicti may be proved like any other fact—by presumptive or circumstantial evidence.

Lord Hale said: "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or, at least, the body found dead, for the sake of two cases—one mentioned in my Lord Coke's Pleas of the Crown, chapter 104, page 232, a Warwickshire case; another that happened in my remembrance in Staffordshire, where A was long missing, and upon strong presumptions B was supposed to have murdered and to have consumed him to ashes in an oven that he should not be found, whereupon B was indicted and convicted and executed, and within one year after A returned, being indeed sent beyond sea by B against his will; and so, though B justly deserved death, yet he was really not guilty of that offense for which he suffered:" 2 Hale's Pleas of the Crown, 290.

Lord Stowell, in *Evans v. Evans*, 1 Hagg. Const. 105, said: "When a criminal fact is ascertained, presumptive proof may be taken to show who did it—to fix the criminal—having there an actual corpus delicti; but to take presumptions in order to swell an equivocal and ambiguous fact into a criminal fact would, I take it, be an entire misapprehension of the doctrine of presumptions."

In *Regina v. Hopkins*, 8 Car. & P. 591, a young woman was indicted for the murder of her bastard child, alleged in some of the counts by drowning, in others by suffocation. The child had been put to nurse after its birth, and at the age of sixteen days she took it, as she said, to take to her father, who lived on the bank of the river Wye. She was seen with the child as late as 6 o'clock in the evening of April 8th, but between 8 and 9 o'clock she arrived at her father's without the child. The body of a child was found in the river Wye, but did not correspond with the description of the child in question, and was found not to be the same. Lord Abinger, C. B., instructed the jury that the prisoner could not be called ²¹ upon by law to account for the child,

or to say where it was, unless there was evidence to show that it was actually dead.

Many other early cases are reported sustaining the rule contended for by plaintiff in error. In *Ruloff v. People*, 18 N. Y. 179 (decided by the New York court of appeals in 1858), the court reviewed the authorities on this subject, and came to the conclusion, with one judge dissenting, that there could be no conviction of murder, unless there was direct proof, either of the death, as by the finding and identification of the body, or of criminal violence adequate to produce death, and exerted in such a manner as to account for the disappearance of the body; that when the death is proved by direct evidence the criminal agency of the accused in producing death may be established by circumstantial evidence. This, it was there held, was the rule at common law, and it was adhered to in New York by the courts until, at a later period, a statute was enacted which prohibited a conviction, "unless the death of the person alleged to have been killed, and the fact of the killing by the defendant, as alleged, are each established as independent facts, the former by direct proof and the latter beyond a reasonable doubt." And in *People v. Palmer*, 109 N. Y. 110, 4 Am. St. Rep. 423, it was held that the statute was simply declaratory of the common law, and that it was not intended by the statute to so change the rule as it existed at common law as to require that the identity of the deceased should also be proved by direct evidence only. In the opinion of the court in that case, to show that it was not intended by the statute to limit the proof of the identity of the deceased to direct evidence, it was said, in argument, that "a murderer may always escape if only he shall so mutilate the body of his victim as to make identification by direct evidence impossible, or shall so effectually conceal it that discovery is delayed until decomposition has taken away the possibility of personal recognition; and it will follow ²² that the tenderness of the Penal Code has opened a door of escape to that brutal courage which can mangle and burn the lifeless body, and has put a premium upon, and offered a reward for, that species of atrocity." This argument would seem to be equally as forcible against the supposed rule that the fact of death can be proved only by direct evidence.

We are satisfied that the strict rule contended for by plaintiff in error has been modified by many authorities, and that the weight of authority now is, that all of the elements of the corpus delicti may be proved by presumptive or circumstantial evidence.

It was said by Jeremy Bentham, that "were it not so, a murderer, to secure himself with impunity, would have no more to do but to consume or decompose the body by fire, by lime, or by any other of the known chemical menstrua, or to sink it in an unfathomable part of the sea": 3 Smith on Judicial Evidence, 234. In *King v. Burdett*, 4 Barn. & Ald. 95, 6 Eng. Com. L. 358, Best, J., said, in speaking of circumstantial evidence: "Until it pleases Providence to give us means, beyond those our present facilities afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit; where presumption is attempted to be received as to the corpus delicti, that it ought to be strong and cogent": See, also, Wills on Circumstantial Evidence. In a copious note to *Riphey v. Miller*, 62 Am. Dec. 177, Freeman says: "But while it is established that the death of the person whom it is charged the prisoner has killed may be proved by circumstantial evidence, it is everywhere held to be necessary to prove this fact by the most convincing evidence that the nature of the case will admit of. In *Smith v. Commonwealth*, 21 Gratt. 809, it was decided that the death of the person charged to have been murdered must be proved by the most cogent and irrefutable evidence." And he there further says: "To require the discovery of the body in every case would ²³ seriously interfere with the administration of justice. It is, therefore, clearly settled that the fact of death may be inferred from such strong and unequivocal circumstantial evidence as renders it morally certain and leaves no room for reasonable doubt": *Riphey v. Miller*, 62 Am. Dec. 177, note 184. See, also, to the same effect, *State v. Williams*, 7 Jones, 446; 78 Am. Dec. 248. In an elaborate note to this case, in which many cases are cited, at page 253, it is said: "Direct and positive evidence is unnecessary to prove the corpus delicti. . . . It may be proved by circumstantial evidence, if it be strong and cogent, and leave no room for reasonable doubt. . . . This rule is now clearly established, and it would be unreasonable to always require direct and positive evidence. Crimes, especially those of the worst kind, are naturally committed at chosen times, in darkness and secrecy. Human tribunals must, therefore, act upon such indications as the circumstances of the case present or admit, or society must be broken up. The cases just cited show that the jury may find a verdict of guilty upon circumstantial evidence, and that the corpus delicti may be proved by such evidence, as well as any other part of the case, and that this rule applies in cases of murder and manslaughter as well as in all

other crimes." And at page 257 it is further said: "But of the various forms of criminal homicide, that of infanticide (by which is popularly understood the murder of a recently born infant for the purpose of concealing its birth) perhaps presents the greatest difficulties in the establishment of the corpus delicti. No universal and invariable rule can be laid down with respect to it. Each case must depend upon its own peculiar circumstances, and, as in all other cases, the corpus delicti must be proved by the best evidence which is capable of being adduced, and such an amount and combination of relevant facts, whether direct or circumstantial, as establish the imputed guilt to a moral ²⁴ certainty, and to the exclusion of every other reasonable hypothesis."

To this general statement of the law we assent. So strict a rule as contended for by plaintiff in error would, as pointed out by many authorities, operate, and especially in cases of infanticide, to completely shield the criminal from punishment for the most atrocious crimes. The complete destruction of the body of a newly born infant might not be difficult. To say that in such a case, while every one would admit that the body could be completely destroyed by animals, by fire, or other destructive agencies, circumstantial evidence, though of the most cogent and convincing character, would not be admissible to show the fact of death, as well as the criminal agency of the accused in producing it, would be to say that there is a class of the most atrocious crimes, which, when committed in secret, as most crimes usually are, and by persons of sufficient capacity and skill to destroy the body, must go unpunished, because the law has closed all avenues but one leading to detection, and has permitted the criminal himself to close that one. We are not prepared to so hold. It is, however, familiar law, and frequently recognized by this court, that extrajudicial confessions of the commission of crime, where such confessions are relied upon to establish guilt, are not sufficient to authorize a judgment of conviction without other sufficient proof of the corpus delicti, but that the corpus delicti should first be otherwise established, not, however, necessarily by direct evidence only: *Andrews v. People*, 117 Ill. 195; *Williams v. People*, 101 Ill. 382; *South v. People*, 98 Ill. 261; *May v. People*, 92 Ill. 343; *Bergen v. People*, 17 Ill. 426; 65 Am. Dec. 676; *Gray v. Commonwealth*, 101 Pa. St. 380; 47 Am. Rep. 733; *State v. German*, 54 Mo. 526; 14 Am. Rep. 481.

It is undoubtedly true that where there is no direct or positive evidence of the death of the person who is charged to have

been murdered, great caution should be observed in acting upon presumptive or circumstantial ²⁵ evidence; but that the fact of death may be so proved, when it is the best evidence obtainable, we have no doubt. It would unnecessarily extend the length of this opinion to review the authorities at length. Many of them will be found cited in the notes to the following cases: *State v. Williams*, 78 Am. Dec. 248, and *Rippey v. Miller*, 62 Am. Dec. 177. See, also, 4 Am. & Eng. Ency. of Law, 309, and notes; 9 Am. & Eng. Ency. of Law, 728; *Burrill on Circumstantial Evidence*, 680; *Kerr on Law of Homicide*, 539; *Wills on Circumstantial Evidence*, 179; *Wharton on Criminal Evidence*. sec. 325, et seq; *United States v. Gibert*, 2 Sum. 19; *State v. Keeler*, 28 Iowa, 551; *Johnson v. Commonwealth*, 81 Ky. 325; *Stocking v. State*, 7 Ind. 326; *McCollough v. State*, 48 Ind. 109; *Lancaster v. State*, 91 Tenn. 267; *Gray v. Commonwealth*, 101 Pa. St. 380; 47 Am. Rep. 733.

We have examined the record with much care, and cannot find that the trial court committed any error in the admission and exclusion of evidence, or in giving or refusing instructions to the jury. Complaint is made by plaintiff in error of the ruling of the court respecting the instructions, but we find no error in this respect. The instructions applicable to both sides of the case were full, and unusually free from error.

The only question remaining to be considered is, whether or not the evidence is sufficient to sustain the judgment. While it is the province of the jury to determine what weight should be given to the testimony, and whether or not the testimony of any particular witness should be believed or not, and while the trial judge and the jury have better facilities for coming to a correct conclusion upon all such questions than we possess, still, the responsibility is at last cast upon this court, when the question is presented, as it is here, to determine whether or not the evidence contained in the record is sufficient to support the judgment of conviction. The record contains but little circumstantial evidence tending to establish the guilt of plaintiff in error. The facts and circumstances proved, independently of the direct testimony ²⁶ given by Nancy Cook, were as consistent with the theory that the child, whether dead or alive, was disposed of by her as that it was murdered by him with her consent and connivance, so that, at last, the conviction must stand or fall upon her own uncorroborated testimony. When she testified she was in jail, jointly indicted with him for the alleged murder. By her own testimony she was a willing accomplice.

It is true that judgments of conviction of crime may be properly based upon the uncorroborated testimony of an accomplice, and this court has frequently so held; but it has always been said that, in such cases, trial courts should proceed with the greatest caution: *Hoyt v. People*, 140 Ill. 588; *Friedberg v. People*, 102 Ill. 160; *Earll v. People*, 73 Ill. 329; *Cross v. People*, 47 Ill. 152; 95 Am. Dec. 474; *Gray v. People*, 26 Ill. 344; *Collins v. People*, 98 Ill. 584; 38 Am. Rep. 105.

In *Hoyt v. People*, 140 Ill. 588, 595, Mr. Justice Scholfeld said: "But the authorities agree, and common sense teaches, that such evidence is liable to grave suspicion, and should be acted upon with the utmost caution, for otherwise the life or liberty of the best citizen might be taken away on the accusation of the real criminal, made either to shield himself from punishment, or to gratify his malice."

It will be noticed that, in the great majority of the cases where this question has arisen for discussion, the testimony of the accomplice was corroborated by other evidence, direct or circumstantial. Still, it is undoubtedly the rule in this state, as stated in *Rider v. People*, 110 Ill. 11, that "whatever the law may be in other states with respect to the right of a jury to convict upon the uncorroborated testimony of an accomplice, it is well settled the right exists here, and convictions upon such testimony will not be disturbed by this court on that ground alone." In addition, however, to the suspicion which must attend the testimony of an accomplice, it is, of course, to be subjected to the same tests which are applied ²⁷ to determine the reliability and force of the testimony of other witnesses. In the case at bar, the accomplice, upon whose unsupported testimony the plaintiff in error was convicted of the murder of her newly born babe, was an ignorant and depraved woman, who did not know the nature of an oath, and had no conception of any punishment to which she would subject herself for testifying falsely. It is evident from the testimony that she felt that she had been greatly wronged by the marriage of the plaintiff in error, and was exceedingly jealous of his wife, whom she accused of trotting back and forth carrying stories to her mother, and of being the cause of all the trouble. At a time previous to her trial, she had been arrested, on the complaint of the wife of plaintiff in error, for concealing the death of her bastard child, and on the examination testified as a witness in her own behalf, but did not, in such testimony, in any way implicate plaintiff in error in the disappear-

ance of her child. She had told Thomas Campbell, a witness for the defendant (if he is to be believed), that the child was born as dead as a stick of wood, and that if John and his wife testified that it was born alive they would swear to a lie; that it was only a little wad of something, and had no life. She complained to this witness that plaintiff in error had prevented her from getting bond and being released from custody. Monroe Crouch, the officer who arrested her, testified that as he remembered her statements to him, she said the child came dead. She stated, when on the stand, that she understood, from what had been said to her or in her presence, that if she testified for the people her testimony would not be used against her, and that she would be protected; that she testified with that understanding. We think it clear that this woman had the strongest motives that could operate upon the human mind to so testify as to inculcate the plaintiff in error and exculpate herself—to obtain her own release and freedom from punishment, ²⁸ and at the same time strike a blow at those whom she thought had wronged her.

It may, however, be said that this was a question for the jury—that it was for them to say whether the witness was worthy of belief or not; and that this court, in accordance with uniform precedents, will not interfere in such a case to set aside the verdict of the jury. In this case, however, the attendant circumstances, with so many persons in such close proximity, as testified to by her, tended to weaken such force as her testimony might otherwise have. Besides, other witnesses, including plaintiff in error, gave testimony contradicting the testimony of the prosecutrix as to what he did on the night in question, which testimony, if true, left no evidence upon which a verdict of guilty could be sustained. The evidence showed that while she made contradictory statements in and out of court, the defendant told the same story from the beginning. There is doubtless a possibility of his guilt, but we are constrained to say that the evidence is insufficient to establish his guilt beyond a reasonable doubt. We think it would be establishing a precedent fraught with much danger to sustain this judgment upon the evidence set out in this record. Upon another trial, other facts and circumstances may possibly be shown which may tend to dissipate the doubts which must arise in any candid mind upon reading the evidence as now presented.

The judgment of the circuit court is reversed, and the cause remanded to that court.

CORPUS DELICTI—OF WHAT CONSISTS.—The corpus delicti consists not merely of an objective crime, but also of the defendant's agency in the crime: *Harris v. State*, 28 Tex App. 308; 19 Am. St. Rep. 837; *Willard v. State*, 27 Tex. App. 386; 11 Am. St. Rep. 197, and note. See, also, extended note to *State v. Williams*, 78 Am. Dec. 252.

CORPUS DELICTI—CIRCUMSTANTIAL EVIDENCE TO ESTABLISH.—The corpus delicti may be proved by circumstantial evidence, but it must be strong and cogent: *State v. Williams*, 7 Jones, 446; 78 Am. Dec. 248, and extended note. The corpus delicti may be proved by circumstantial evidence, if satisfactory to the understanding and conscience of the jury beyond a reasonable doubt: *Willard v. State*, 11 Am. St. Rep. 197, and note. See, also, the note to *People v. Palmer*, 4 Am. St. Rep. 431.

ACCOMPLICES—CONVICTION ON UNCORROBORATED TESTIMONY OF.—A legal conviction may be had upon the uncorroborated testimony of an accomplice: *Cross v. People*, 47 Ill. 152; 95 Am. Dec. 474; *State v. Holland*, 83 N. C. 624; 85 Am. Rep. 587, and note; *Dunn v. People*, 29 N. Y. 523; 86 Am. Dec. 319, and note; *State v. Stebbins*, 29 Conn. 463; 79 Am. Dec. 223, and note. Contra, *Blakely v. State*, 24 Tex. App. 616; 5 Am. St. Rep. 912, and note; *Ray v. State*, 1 G. Greene, 316; 48 Am. Dec. 379, and note.

CHICAGO & ALTON RAILROAD COMPANY v. DAVIS.

[159 ILLINOIS, 53.]

COURTS — JURISDICTION OF — APPELLATE PROCEDURE.—If the amount involved in an action was greater than one thousand dollars, and an appeal was taken to the appellate court, where the judgment was reduced below that sum, and an appeal is then taken by the appellant to the supreme court, the latter has jurisdiction though the decision of the appellate court has reduced the amount in controversy to a sum less than one thousand dollars.

A CARRIER'S DUTY INCLUDES THE FURNISHING OF A GOOD AND SUFFICIENT VEHICLE in which to transport articles which it undertakes to carry.

A CARRIER FURNISHING A DEFECTIVE REFRIGERATOR CAR whereby property shipped therein becomes heated and spoilt, is answerable to the shipper for the resulting damages.

A CARRIER IS NOT RELIEVED FROM LIABILITY FOR DAMAGES RESULTING FROM FURNISHING A DEFECTIVE REFRIGERATOR CAR, by the fact that the person of whom the shipper purchased the goods shipped had undertaken the duty of inspecting such car and had been negligent. In performing such duty, he was the agent of the carrier, and not of the shipper.

LIMITING LIABILITY BY CONTRACT.—A stipulation in a bill of lading that the carrier shall not be answerable for decay of perishable articles, or injury by heat or frost, does not relieve it from liability for its own negligence in furnishing a defective refrigerator car.

A BILL OF LADING ASSUMING TO EXEMPT A CARRIER from liability does not accomplish that purpose, unless the shipper accepted the bill of lading understanding and assenting to the restrictions contained therein, and whether he did so is a question of fact.

Lee & Hay, for the appellant.

Eastman & Schumacher, for the appellee.

⁵⁷ CARTER, J. This was an action on the case, brought by appellee, against appellant, to recover damages for the negligence of the latter in transporting a carload of green hams from Kansas City to Cincinnati, whereby they were injured. The amount claimed in the declaration was fifteen hundred dollars. The cause was tried by the court without a jury, and a judgment was rendered for the plaintiff for one thousand and fifty-one dollars and forty-six cents. The defendant took its appeal to the appellate court, where it was held that as to certain items, amounting to two hundred and seventy-two dollars and seventy-eight cents, the judgment was erroneous, the damages as assessed being to that amount in excess of the damages actually sustained by the plaintiff, and the plaintiff having remitted such excess, the judgment was affirmed as to the balance, seven hundred and seventy-eight dollars and sixty-eight cents. The defendant then took this appeal from said judgment of affirmance.

Appellee has entered his motion here to dismiss the appeal on the ground that the amount involved is less than one thousand dollars, and that this court is without jurisdiction to entertain the appeal. The motion having been reserved to the final hearing, it will now be first disposed of. The question arising on this motion was directly involved in *Gilmore v. Courtney*, 158 Ill. 432. We there held that, the amount involved on the appeal to the appellate court being in excess of one thousand dollars, an appeal lay to this court, notwithstanding the remittitur in the appellate court, whereby the judgment was reduced below that amount. This motion must be controlled by that decision, and it is, therefore, overruled.

The principal act of negligence complained of, and which, on this appeal must be taken as proved, was, that the refrigerator car furnished by appellant in which to transport the hams was defective, by reason of having a strip torn from the inside door, whereby warm air from the outside was admitted, melting the ice and heating the hams, so that they were in part spoiled en route. The ⁵⁸ order for the hams was sent by appellee from Cincinnati to Dunham, Norris & Co., brokers at Kansas City, and called for a carload of green hams of the Armour Packing Company's hams. Dunham, Norris & Co. placed the order with the Armour Packing Company. Appellant furnished the refrigerator car, and undertook to transport and deliver the hams. The

evidence showed that, by the course of business between the packing company and appellant, appellant inspected its own cars in all respects, except as to their sufficiency as refrigerator cars. As to the latter feature, the inspection was by the Armour Packing Company. The defect in the car was not apparent from the outside, but would readily be discovered on inspection. It was the duty of the carrier to provide a good and sufficient vehicle in which to carry the hams (St. Louis etc. Ry. Co. v. Dorman, 72 Ill. 504; Indianapolis etc. Ry. Co. v. Strain, 81 Ill. 504; 3 Am. & Eng. Ency. of Law, 16 a), and this it undertook to do. It could employ such agents to inspect its cars as it saw fit, and if, by special contract or by its course of business between itself and the packing company, it relied on the latter to inspect the refrigerating qualities of its cars, that was a matter between itself and the packing company, and did not concern appellee. The mere fact that appellee purchased the hams from the packing company did not relieve the appellant from its duty to provide a safe and suitable car in which to transport the hams.

The rule that, in making the contract for transportation, the consignor acts as the agent of the consignee, would not apply in this case to the question under discussion, for the evidence tended to show, and it must be taken in this court as established, that in the selection and inspection of the car the packing company acted as the agent of appellant, and not of appellee; and as the loss occurred by reason of a defect in the car, and not from any defective or improper manner of loading the car, ⁵⁹ or of packing the hams therein, the negligence complained of cannot be ascribed to appellee or his agents, so that the case is presented of the injury having occurred by reason of the negligence of appellant in not providing a safe and suitable car in which to transport the hams.

To the ordinary mind liability would seem to follow as a matter of course. But it is claimed that appellant limited its liability by the bill of lading, which provided that the carrier should not be liable "for decay of perishable articles, or injury by heat or frost." This provision in the bill of lading did not purport to provide against the liability of the carrier which would arise from its own negligence in furnishing a defective vehicle for carriage. The refrigerator car was specially intended to safely transport articles which were, in their nature, perishable from heat. Appellant undertook to furnish such a car suitable for the transportation of such articles, and it could not, in reason, be contended that this provision was intended to relieve appel-

lant from its duty to do the very thing which it was otherwise bound to do, and without which the property would, as it well knew, be destroyed in transit, and the whole purpose of the transportation be defeated. Besides, conceding that common carriers may, by contract, limit their common-law liability, as we have held in many cases (see *Chicago etc. Ry. Co. v. Chapman*, 133 Ill. 96, 23 Am. St. Rep. 587, where these cases are reviewed), still, unless the shipper accepted the bill of lading, and understood and assented to the provisions restricting the carrier's liability, he would not be bound by such restrictive provisions. And whether or not he understood and assented to such restrictive provisions in the bill of lading is a question of fact, and is conclusively found against appellant by the judgment of the appellate court: *Chicago etc. Ry. Co. v. Montfort*, 60 Ill. 175, and cases there cited; *Merchants' etc. Co. v. Joesting*, 89 Ill. 152; *Erie etc. Co. v. Dater*, 91 Ill. 195; 33 Am. Rep. 51.

⁶⁰ What has been said sufficiently disposes of the questions raised by counsel respecting the propositions of law held, refused, or modified by the trial court.

Finding no error in the record the judgment of the appellate court will be affirmed.

CARRIERS—DUTY TO FURNISH PROPER VEHICLE.—This question will be found discussed in the notes to the following cases: *Ingalls v. Bills*, 43 Am. Dec. 362; *Grand Rapids etc. R. R. Co. v. Huntley*, 31 Am. Rep. 324; *Hegeman v. Western R. R. Corp.*, 64 Am. Dec. 525; *Curtis v. Rochester etc. R. R. Co.*, 75 Am. Dec. 268.

A COMMON CARRIER CANNOT STIPULATE AGAINST ITS OWN NEGLIGENCE: Note to *Jones v. St. Louis etc. Ry. Co.*, 46 Am. St. Rep. 519.

CARRIERS—LIMITATION OF LIABILITY—ASSENT OF SHIPPER.—Stipulations in a bill of lading, which limit or exempt a carrier from loss or damage to goods unless notice thereof is given within a certain time, are not effectual without proof of express assent thereto by the shipper: *Central R. R. Co. v. Hasselkus*, 91 Ga. 382; 44 Am. St. Rep. 37, and note. See, also, the extended notes to *Kirby v. Western Union Tel. Co.*, 46 Am. St. Rep. 779, and *Kansas City etc. R. R. Co. v. Bodebaugh*, 5 Am. St. Rep. 720.

B. S. GREEN COMPANY v. BLODGETT.

[159 ILLINOIS, 169.]

APPELLATE PROCEDURE—WAIVER.—If, from the record, it appears that a demurrer to a replication was overruled, and, by agreement of the parties, the issues joined were submitted to the court for trial, it will be presumed that, if any error occurred in the action of the court on the demurrer, such error was waived.

A CORPORATE SEAL IS NOT ESSENTIAL to the validity of a written contract entered into by a corporation.

CORPORATIONS, POWERS OF.—A SUBSCRIPTION of a sum of money by a corporation, to be paid on the location of a post-office on a lot adjoining that on which its business was conducted, is not ultra vires, where it is engaged in manufacturing and dealing in certain articles of merchandise, and the location of the postoffice might reasonably be expected to promote its business and enhance its profits.

Kerrick & Spencer, for the appellant.

John E. Pollock, and Pollock & Condon, for the appellee.

172 CARTER, J. This was an action in assumpsit upon a writing in these words:

“Bloomington, Ill., March 14, 1891.

“We, the undersigned, agree to pay to Charles H. Blodgett, or order, the sum set opposite our respective names, within thirty days after lots nine (9), sixteen (16), seventeen (17), eighteen (18), and nineteen (19), proprietor's subdivision of lots one (1) to six (6), original town (now city) of Bloomington, in McLean county, Illinois, are definitely accepted as a site for the postoffice building—if not paid when due, the sums subscribed to bear eight per cent per annum from the time when due: B. S. Green Company, one thousand dollars (\$1,000), without interest; H. S. Swayne, Agt., \$1,500; Dr. H. Schroeder, \$500; S. Livingston, \$500; Wolf Griesheim, \$500.”

The defendant company filed three pleas to the declaration: 1. The general issue; 2. Non est factum, verified; 3. No consideration. The plaintiff replied to the third plea that “the said contract in the plaintiff's declaration mentioned was a mutual subscription, signed by the various parties thereto for a common object, to wit, the location of the government postoffice building on the northwest corner of Jefferson and East streets, in the city of Bloomington. And plaintiff avers that there has been, since the making of the subscription, a large expenditure of money for the purpose of accomplishing the object for which said subscription was made, to wit, the location of the government building as aforesaid.” **173** Defendant demurred to this replication, and the court overruled the demurrer. By agreement of the parties, the case was tried by the court without a jury. Judgment was entered for plaintiff for one thousand and eleven dollars and sixty-six cents, and an appeal was prosecuted to the appellate court for the third district, where a judgment was entered reversing the judgment of the trial court and remanding the cause:

B. S. Green Co. v. Blodgett, 45 Ill. App. 180. The case was redocketed and again tried before the same judge without a jury, further evidence being introduced, and resulted in a judgment in favor of plaintiff for one thousand and eighty-one dollars and twenty cents, and defendant appealed to the appellate court, where the judgment was affirmed: B. S. Green Co. v. Blodgett, 55 Ill. App. 556. From said judgment of affirmance this appeal is taken.

All questions of fact must, on this appeal, be taken as having been conclusively found against appellant, and hence it must be taken as proved that it authorized its president, B. S. Green, to execute the written instrument sued on, or ratified the act after the instrument was executed. There are, therefore, but three questions for us to consider: 1. The ruling of the trial court in overruling the demurrer to the replication to the third plea; 2. Whether or not the instrument sued on failed to bind the corporation for the reason that the corporate seal was not attached; and 3. Whether or not it failed to bind the corporation for the reason that it was an act ultra vires.

As to the first question, it is sufficient to say that it must be presumed, from the record, that the appellant waived its right to question the ruling of the court in overruling its demurrer. The recital in the record is: "And the court having heard said demurrer, and being fully advised in the premises, doth consider the same overruled, and by agreement of the parties hereto, by their attorneys, the issues being joined are submitted to the court for trial without the intervention of a jury." Evidence was then adduced under the replication as if issue of fact had been joined. The record is silent as to ¹⁷⁴ whether the appellant elected to abide its demurrer or to answer over, but we think the fair inference is, that the parties treated the replication as having been traversed. Having treated the issue as one of fact, the error of the trial court, if any there was, in its ruling on the issue of law made by the demurrer, has been waived: *Strohm v. Hayes*, 70 Ill. 41, and cases there cited; *Lincoln v. Cook*, 2 Scam. 61; *Gardner v. Haynie*, 42 Ill. 291; *Camp. v. Small*, 44 Ill. 37.

We are also of the opinion that, if the corporation had the power to make the instrument in question, it was not essential to its validity to have the corporate seal attached. It is no longer the law that a corporation is bound by its contracts only when made under its corporate seal. The rule now is, that a corporation may bind itself, in a matter within its charter powers, by a writing not under seal to the same extent as an individual may:

Morawetz on Corporations, sec. 338, p. 320; Cook on Stocks and Stockholders, sec. 721, p. 1094; Muscatine Water Co. v. Muscatine Lumber Co., 85 Iowa, 112; 39 Am. St. Rep. 284; Gottfried v. Miller, 104 U. S. 521; 4 Am. & Eng. Ency. of Law, 242, and cases cited; New Athens v. Thomas, 82 Ill. 259; Racine etc. R. R. Co. v. Farmers' Loan etc. Co., 49 Ill. 331; 95 Am. Dec. 595; Board of Education v. Greenebaum, 39 Ill. 609.

We are also inclined to hold that, in making the subscription and executing the instrument sued on, appellant did not exceed its corporate powers. It was a corporation organized under the general laws of the state, for the purpose of, and was engaged in, manufacturing and dealing in saddlery, hardware, leather, shoe findings, and vehicles. Its place of business was in a building which it owned adjoining the postoffice site on the Blodgett lots. Its capital stock was one hundred thousand dollars, of which said B. S. Green, who was its president, treasurer, and general manager, owned eighty-nine thousand seven hundred dollars, his brother, Marshall J. Green, a clerk and secretary of the company, ten thousand dollars, and the attorney of the company three hundred dollars. The board of directors consisted ¹⁷⁵ of these three persons, and held meetings annually, only. We think the case is within the reasoning employed by this court in enforcing a similar subscription in *Richelieu Hotel Co. v. International etc. Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, and we are disposed to agree with what was said on this question by Mr. Justice Boggs in the decision of the case at bar in the appellate court, as follows:

"The location of the postoffice adjoining the place of business of the company would be of direct financial and business advantage and benefit to it. Many persons—indeed, the people generally—residing in the city and the vicinity, would thereby be caused to pass and repass the company's place of business frequently, and would naturally have their attention attracted to the articles it kept for sale, and to the fact that it was an applicant for the patronage of all who desired, or might have need of, the goods it made and sold. The effect would be to bring its business and the line of trade prominently before the public, to increase the number of its customers and the amount of its sales, and, consequently, to add to its gains and profits. It would serve as an advertisement of its business, and add to the volume of its trade, as would advertisements in the public newspaper, or by way of handbills distributed among the people through the postoffice, or by signs painted on the fences or otherwise displayed

in public places. It is believed that efforts to attract public attention, and thus secure additional trade, have become a legitimate part of the business of tradesmen and corporations in nearly all lines of trade and business. Large sums of money are devoted to this purpose annually by firms and managers of corporations. Such outlays are now regarded as part of the legitimate expenses of a firm or corporation engaged in selling wares to the public, as fully as the cost of advertising in the newspapers, of rent, insurance, clerk hire, taxes, etc. A contract made by the general manager of a business corporation of the character and capital of the appellant ¹⁷⁶ company, with a public newspaper to advertise the business of the firm, or with a sign-writer to paint or post signs in conspicuous places along the lines of highways or railroads, or in other ways to bring its business prominently before the public, would properly be regarded as within the scope of his authority and power as an agent of the company. Much greater sums than that agreed to be paid by the subscription in the case in hand are often appropriated by judicious business managers to the matter of advertising. It seems to us that the promise sued upon was clearly a reasonable exercise of the power possessed by the president, treasurer, and general manager of the appellant company, and that the corporation he represented ought to be held liable for his contract, which was so well calculated to secure to it additional customers, more extended trade, and greater gains and profits": See, also, *Kadish v. Garden City etc. Assn.*, 151 Ill. 531; 42 Am. St. Rep. 256, and cases cited.

Finding no error in the record, the judgment of the appellate court will be affirmed.

The Corporate Seal.

The English Rule.—It has been said that "a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal": 1 Blackstone's Commentaries. 475. There are, indeed, decisions which seem to sustain this statement, and which assume that a corporation is not bound by any contract not under seal, and even lend some color to the statement that it cannot act except its action be attested by such seal: *Winne v. Bampton*, 3 Atk. 573; *Taylor v. Dulwich Hospital*, 1 P. Wms. 655. We doubt whether this was ever wholly true, and certainly it has not been so at any recent period, though it is not unusual, even in comparatively recent decisions, to find cases refusing to enforce contracts or to give effect to other corporate acts because of the absence of the corporate seal. These contracts or acts were of an important, or perhaps unusual, character, such as did not fall within the daily routine of the business of the corporation. The most we can gather from the English decisions up to the present time is, that it is not true that a corporation must always act or contract under seal, nor is it true that it may always act

or contract without a seal. As to those acts or contracts which, if done or made by a natural person, must have been attested by his seal, there has not at any time been, nor is there now, any doubt that, if done or made by a corporation, they must also be attested by its seal. Even as to other acts and contracts, it was sometimes necessary for the corporation to act under its seal, though a natural person need not have used his, but it was by no means necessary that the seal be employed in all cases. In a comparatively early case, objection to the return of a mandamus was interposed, on the ground that it was made in the name of the corporation but without the common seal. "After a search for precedents, which were found both ways, Holt, C. J., held, and the rest concurred, that though a corporation cannot do an act in pais without their common seal, yet they may do an act upon record, and that is the case of the city of London every year, who make an attorney by warrant of attorney in this court, without ever sealing or signing; and the reason is, because they are estopped by the record to say it is not their act": Mayor of Thetford's case, 1 Salk. 192; 3 Salk. 103.

It is clear that any corporation which engages in a general business of any character requiring the performance of numerous acts and the employment of many servants or agents cannot be expected to act or speak only by its seal, and that to make or enforce such a requirement would be to place it within the power of competitors who were able to transact their business with less formality and in a more common-sense method. Hence, even in England, the requirement of the use of the corporate seal extends only to acts and contracts of a somewhat unusual character, in connection with which the corporate seal may be used without hampering the corporate business, or, in other words, where "to have required the seal would certainly not have tended to defeat the object for which the corporation was formed, nor was the subject matter of the contract one either of frequent occurrence or of urgency admitting of no delay." Therefore, it was held that a resolution entered into at a corporate meeting, that the sum of five hundred pounds should be paid in consideration of certain improvements to be made, would not support a setoff in favor of the person accepting such resolution and making such improvements, because the contract of the corporation had not been attested by the corporate seal. The court based its decision upon the assumption that every member of a corporation "knows that he is bound by what is done under the corporate seal, and nothing else," and that the "seal, or some substitute for the seal, which by law shall be taken as conclusively evidencing the sense of the whole corporate body, is a necessity inherent in the very nature of the corporation": Mayor of Ludlow v. Charlton, 6 Mees. & W. 822. A lease of lands of a corporation is one of the unusual acts not requiring such immediate attention as to dispense with the corporate seal, and therefore a corporation is not, in England, bound by an unsealed lease or contract for a lease: Carter v. Dean of Eli, 7 Sim. 211. A like rule applies to contracts to purchase real property: Gooday v. Colchester etc. Ry., 17 Beav. 132; Preston v. Liverpool Ry. Co., 17 Beav. 114; 5 H. L. Cas. 605. A contract on the part of a dock company for scavenging its docks for a year was held invalid because not under seal: London Dock Co. v. Sinnott, 8 El. & B. 347; while a contract for the use of a dock for a vessel was held not to require any seal, on the ground that it was a corporate act of frequent occurrence and not admitting of delay: Wells v. Mayor of Hull, L. R. 10 Com. P. 402. The statement made in many cases, that what are known as trading corporations are exempt from the common-law rule requiring corporations to speak or act by the common seal, is but an application of the general rule, that when a contract is of an ordinary or usual character, and clearly within the business which the corporation was formed to transact, it may be entered into and become obligatory on both parties, though not attested with the corporate seal: South of Ireland etc. Co. v. Waddle, L. R. 3 Com. P. 463; Henderson v. Australian etc. Co., 5 El. & B. 409; Australian etc. Co.

v. Hazett, 11 Ex. 228; Church v. Imperial etc. Co., 6 Ad. & E. 829; In re Ebbw Vale Co., 1. R. 8 Eq. 14. The English case which best states the general rule and the exceptions to it prevailing in that country is Church v. Imperial etc. Co., 6 Ad. & E. 846, 861, in which it was said: "The general rule of law is, that a corporation contracts under its common seal; as a general rule, it is only in that way that a corporation can express its will, or do any act. That general rule, however, has, from the earliest traceable periods, been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions; on the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon": See, also, Henderson v. Australian etc. Co., 5 El. & B. 409; Denton v. East etc. Co., 3 Car. & K. 16.

In the United States cases may be found stating in general terms that the assent of a corporation to its contract must be expressed under its corporate seal: Waller v. Bank of Kentucky, 3 J. J. Marsh, 201; or holding that a bond given by a private corporation is not valid in the absence of such seal: South Missouri etc. Co. v. Jeffries, 40 Mo. App. 360; Tanner etc. Co. v. Hall, 22 Fla. 391; but as to the first proposition, what was said was clearly a dictum, and as to the second, it cannot be ascertained from the reports of the cases whether or not the bond in question was not one which required to be sealed, even had it been executed by or on behalf of a natural person. In this country, the rule is well nigh, if not absolutely, universal, that a corporation need not do any act or execute any contract or writing under its seal, except it be such as to require a seal when done or executed as the act or contract of a natural person. No distinction is attempted to be made between the ordinary and frequently recurring business acts of a corporation and those of less frequent occurrence, and in the doing of which the corporation was not impelled by any special urgency and could have taken time to affix its seal, had it thought proper to do so. This must necessarily be so as to those acts or contracts which ordinarily rest in parol, and which are carried on by the officers and agents of the corporation at its place of business, or elsewhere, and which are not accompanied with any formality when carried on by natural persons or their authorized agents: Ross v. Madison, 1 Ind. 281; 48 Am. Dec. 361; Crowley v. Genesee etc. Co., 55 Cal. 273; Lee v. Flemingsburg, 7 Dana, 28. This is equally true of contracts in writing when not required to be under seal when entered into by or between natural persons: Campbell v. People, 159 Ill. 9; ante, p. 134; as promissory notes: Mott v. Hicks, 1 Cow. 513; 13 Am. Dec. 550, and note; Commercial Bank v. Newport etc. Co., 1 B. Mon. 13; 35 Am. Dec. 171; Barker v. Mechanics' etc. Co., 8 Wend. 94; 20 Am. Dec. 664; Hamilton v. New Castle etc. Ry., 9 Ind. 359; and indorsements and other transfers thereof: Everett v. United States, 6 Port. 166; 30 Am. Dec. 584; Garrison v. Combs, 7 J. J. Marsh. 84; 22 Am. Dec. 120; Garvey v. Colcock, 1 Nott & McC. 231; delegations of authority to agents to collect and secure debts: Lathrop v. Commercial Bank, 8 Doug. 114; 33 Am. Dec. 481; agreements to sell and convey real property: Banks v. Poitiaux, 3 Rand. 136; 15 Am. Dec. 706; chattel mortgages: Duke v. Markham, 105 N. C. 131; 18 Am. St. Rep. 889; implied contracts of every character: Hamilton v. Newcastle etc. Ry. Co., 9 Ind. 359; New Athens v. Thomas, 82 Ill. 259; all delegations

of authority to officers or other agents which in the case of natural persons need not be under seal: *Fleckner v. United States Bank*, 8 Wheat. 356; *Board of Education v. Greenebaum*, 39 Ill. 609; contracts for the doing for or by the corporation of any work for which it is authorized to contract: *Christian Church v. Johnson*, 53 Ind. 273; *Muscatine etc. Co. v. Muscatine etc. Co.*, 85 Iowa, 112; 39 Am. St. Rep. 284; *National etc. Assn. v. Prentice etc. Co.*, 49 Minn. 220; bills of sale of personal property: *Cary etc. Lumber Co. v. Cain*, 70 Miss. 628; assignments of letters patent: *Gottfried v. Miller*, 104 U. S. 521; or of leases of real property: *Sandford v. Tremlett*, 42 Mo. 384. The acts or contracts of a corporation which need not be evidenced by its corporate seal are by no means limited to the illustrations given above. In truth, there is in this country no limitation whatever that is not equally applicable to the acts and contracts of natural persons. A certificate of stock need not be under the seal of the corporation: *Fitzhugh v. Bank*, 3 T. B. Mon. 126; 16 Am. Dec. 90. Though the statute, in the case of certain corporate bonds of a public, or quasi public, character, manifestly intends that they shall be issued under seal, still, if they are issued without such seal through inadvertence or misunderstanding, and are accepted and received by purchasers in good faith and for value, they will be regarded as binding to the same extent as if the seal had not been omitted therefrom: *Solon v. Williamsburg*, 114 N. Y. 122; *Bernards Tp. v. Stebbins*, 109 U. S. 341. The American rule, with some of the reasons in its support, was thus stated: "The old doctrine that corporations can only be bound by act under their corporate seal has been long exploded. They have become numerous, and their operations extend to almost every enterprise of the country, demanding such powers and facilities within their sphere of action as belong to natural persons in the prosecution of like enterprises, and, being intangible and invisible beings, created by law, they can exercise them through natural persons only. Unless they may be bound in the ordinary affairs of the corporation by the acts and admissions of their officers, they would enjoy an immunity incompatible with the rights of individuals, and destructive of the objects of their creation": *Chicago etc. R. R. v. Coleman*, 18 Ill. 299; 68 Am. Dec. 544. "It is well settled that the acts of a corporation evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents, as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents as by deed; and promises might as well be implied from its acts and the acts of its agents, as if it had been an individual": *Board of Education v. Greenebaum*, 39 Ill. 612.

It follows from what we have already said, that the effect of the omission to affix the corporate seal to a contract, or other writing intended to bind the corporation, is to be found by inquiring whether such writing would be binding on a natural person if not attested with his seal. In some of the states, the distinction between sealed and unsealed writings has been abolished, and all writings may be properly executed by the signature of the persons intended to be bound by them, and, where such is the case, we see no necessity for the use of a seal when a corporation is a party, though its use may be desirable for purposes which we shall hereafter state. On the other hand, if the writing is such that a natural person must attest it with his seal, then a corporation is equally bound to use something as its common or corporate seal, and the effect of its omission to do so will be the same as if a natural person, in his attempted execution of a like instrument, had been guilty of a similar inadvertence or omission: *Duke v. Markham*, 105 N. C. 131; 18 Am. St. Rep. 889; *Danville Seminary v. Mott*, 136 Ill. 289; *Kinxie v. Chicago*, 2 Scam. 187; 33 Am. Dec. 443; *State v. Allis*, 18 Ark. 269; *Garrett v. Belmont Land Co.*, 94 Tenn. 459; *Sandford v. Tremlett*, 42 Mo. 384; *State v. Senft*, 2 Hill (S. C.), 367.

According to the rules of practice prevailing in some of the courts, a

corporation, in answering therein, is required to do so under its common seal. Such appears to be the case in Virginia, when it is required to answer a garnishment; *Baltimore etc. R. R. Co. v. Gallahue*, 12 Gratt. 655; 65 Am. Dec. 254. Under the practice prevailing in courts of chancery, it was always proper, and probably necessary, for a corporation to answer by its corporate seal, and, if the proper officer refused to affix it, he could be compelled to do so by mandamus, and, when so affixed, the answer seems to have had the same effect as the answer of a natural person, duly verified: *Foster's Federal Procedure*, sec. 151; *Daniell's Chancery Practice*, 4th Am. ed., 146; *Angell and Ames on Corporations*, secs. 665, 666; *Baltimore etc. R. R. v. Wheeling*, 13 Gratt. 40; *Haight v. Morris Aqueduct*, 4 Wash. O. C. 605; *Ransom v. Stonington Bank*, 13 N. J. Eq. 212.

The Omission of a Corporate Seal in those cases in which it is required to be used to attest a contract, writing, or other act, has substantially the same effect as the omission of a natural person to so sign or otherwise execute a contract that it shall be obligatory upon, and enforceable against, him: *Koehler v. Black etc. Co.*, 2 Black. 715; *In re St. Helen Mill Co.*, 3 Saw. 88; *Eagle etc. Co. v. Monteith*, 2 Or. 285; *Richardson v. Scott etc. Co.*, 22 Cal. 156. Under the statute of frauds, a party who has himself duly executed a contract, cannot generally plead the statute as against the other party who did not execute it, but must, if the latter assumes to enforce the contract, be regarded as bound by it. It is said, however, that if a corporation has not sealed a contract with its common seal, it is not enforceable against the other contracting party, though he, on his part, did sign and otherwise properly execute it, because both of the parties ought to be bound or neither, and the corporation ought not to be able to rely on a contract which, for want of its seal, is not enforceable against it: *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 18. There must be many instances in which a contract, even if it be conceded to be one which ought to have been attested by the corporate seal, is binding on the corporation because it has been fully executed by the other contracting party, and the corporation has received the benefits of such contract. This is notably true of many ultra vires contracts: *Pomeroy on Contracts*, sec. 56; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 20 Am. Rep. 504; *Miners' etc. Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300. And the reasons which estop corporations from asserting the defense of ultra vires are at least equally persuasive, when the only defense urged is a failure to give authenticity to a contract by the use of a common or corporate seal. So corporations, as well as natural persons, are subject to the law of specific performance, and may, though their contracts or other writings were not at their origin enforceable, because of the absence of the corporate seal or of some other defect in their execution, be required to submit to a decree for specific performance when the other contracting party has, by his acts of part performance, accepted by the corporation, been placed in a position where, to deny such performance, would be manifestly inequitable: *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 18; *Wood v. Tate*, 2 Bos. & P., N. R., 247; *Commissioners v. Merril*, L. R. 4 Ex. 162. In equity, we naturally expect less effect to be given, than at law, to the omission of a corporate seal, even though the instrument in question is one to which such a seal ought to have been affixed, for if it were intended as the act of the corporation, and its execution was authorized by a resolution of the board of trustees, or by any other competent authority, then it can be sustained in equity, and the corporation required to affix its seal: *Missouri River etc. Ry. Co. v. Commissioners*, 12 Kan. 482; or the instrument can be given effect by regarding that as done which ought to be done. Hence, though a mortgage to which the seal of the corporate mortgagor is not affixed is not valid at law, yet it may be enforced in equity by treating it as an equitable mortgage, or, at least, as an agreement for a mortgage, subject, however, to other and paramount equities and to equities equally entitled to con-

sideration supported either by legal liens or by legal title: *Allis v. Jones*, 45 Fed. Rep. 148; *Miller v. Rutland etc. Co.*, 36 Vt. 452.

The Effect of the Corporate Seal is, in England, in many instances, as we have seen, to constitute the only competent evidence of the final corporate action, while in this country, its presence is not indispensable, except in those cases in which the writing is of a character requiring a seal, even when executed on behalf of a natural person. The seal, when not indispensable, is always appropriate, and should be affixed to all writings to which the corporation is a party, unless, indeed, its presence necessarily changes their character and effect so as to prevent their accomplishing the purposes intended by the parties. Thus, they may not intend that the instrument shall be, technically speaking, a speciality, but should have the incidents and be enforceable by the remedies attending simple contracts. It has been held that the affixing of the corporate seal to a contract has the same effect as the affixing of the seal of a natural person; in other words, that it creates a speciality, actions for the enforcement of which must, where the common law prevails, be in the form appropriate to contracts under seal, and though the contract is in form negotiable, that it cannot, as in the case of promissory notes, have the attributes of negotiability: *Clark v. Farmers' etc. Co.*, 15 Wend. 256; *Porter v. Androscoggin etc. Co.*, 37 Me. 349; *Benoist v. Carondelet*, 8 Mo. 250. Thus holding would necessarily deprive a corporation of the power of making simple contracts, where the common law requiring their assent to be evidenced by a corporate seal has not been modified. So far as instruments negotiable in form are concerned, the rule is generally, if not universally, treated as obsolete, and such an instrument, though the corporate seal is impressed upon it, is negotiable to the same extent as if executed by a natural person, not under seal: *In re General Estates Co.*, L. R. 3 Ch. 758; *Mercer Co. v. Hacket*, 1 Wall. 83; *Mason v. Frick*, 105 Pa. St. 162; 51 Am. Rep. 191; *White v. Vermont etc. Ry.*, 21 How. 575; *Auerbach v. Le Sueur etc. Co.*, 28 Minn. 291; 41 Am. Rep. 285.

The reason why it is desirable to attest all contracts and other acts of the corporation with its seal, when this is possible, is that the presence of such seal establishes, *prima facie*, that the instrument to which it is affixed is the act of the corporation, and dispenses with the necessity of any proof, on the part of the person claiming under it, that it was executed by the proper officers, that they had authority to so execute it, and that all proceedings, of whatever character, necessary to such authority had been duly given, unless the corporation shall first, by competent evidence on its part, have rebutted the presumption arising from the presence of the common seal. It is sometimes said that, the signatures of the proper officers appearing, it will be presumed from the presence of the seal that it was affixed by them after being duly authorized to do so, but the rule is by no means limited to those cases in which it appears that the officers who executed the instrument were the proper officers to do so. In truth, as we understand the law, while it is usual for the officers who execute the instrument on behalf of the corporation to sign it themselves in their official capacity in such a way that an inspection of the writing will show what officers or agents undertook to act for the corporation, this is not necessary: *Jackson v. Walsh*, 3 Johns. 226; *Angell and Ames on Corporations*, sec. 225; *Doe v. Hogg*, 1 Bos. & P., N. R., 306; *Clark v. Farmers' etc. Co.*, 15 Wend. 256; *Sugden on Vendors*, 8th Am. ed., 730. It is sufficient that the name of the corporation be written by some officer or agent, and we doubt, under the foregoing authorities, whether anything more is necessary than the affixing of the seal. In other words, as we understand the rule, the sealing by a corporation has an effect equal to the signing and sealing by a natural person. It is not, however, usual to employ the seal alone. The common practice "is to affix the seal with a declaration that it is the seal of the corporation, and to verify the act by the signatures of the president and secretary of the corporation": *Kinsie v. Chicago*, 2 Scam. 187; 33 Am. Dec. 443.

A writing being produced upon which the seal of the corporation appears to be impressed, such seal entitles it to be received *prima facie* as the act of the corporation, and no evidence need be offered, in the first instance, to show by whom it was affixed, or that resolutions were adopted or measures taken which were necessary, either to confer authority on the officer or agent who affixed it to act for the corporation, or that the corporation itself had taken such special steps as to entitle it to execute the instrument in question. The use of the seal is presumed to be a lawful use: *Indianapolis etc. R. R. Co. v. Morganstern*, 103 Ill. 149; *Leavenworth v. Rankin*, 2 Kan. 357; *Morris v. Keil*, 20 Minn. 531; *Evans v. Lee*, 11 Nev. 194; *Central Nat. Bank v. Charlotte etc. R. R. Co.*, 5 S. C. 156; 22 Am. Rep. 12; *Mickey v. Stratton*, 5 Saw. 475; *Solomon's Lodge v. Montmollin*, 58 Ga. 547; *Wharf etc. Co. v. Wimpson*, 77 Cal. 286; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401; *Koehler v. Black River etc. Co.*, 2 Black. 715; *Lovett v. Steam Saw Mill Assn.*, 6 Paige, 54; *Reed v. Bradley*, 17 Ill. 321; *Clarke v. Imperial etc. Co.*, 4 Barn. & Adol. 315; Nev. & M. 206; *Hopkins v. Gallatin etc. Co.*, 4 Humph. 403; *Musser v. Johnson*, 42 Mo. 74; 97 Am. Dec. 316; *St. Louis Public Schools v. Risley*, 28 Mo. 415; 75 Am. Dec. 131; *Burrill v. Nahant Bank*, 2 Met. 135; 35 Am. Dec. 395; *Berks etc. Road v. Myers*, 6 Serg. & R. 12; 9 Am. Dec. 402. The seal itself is *prima facie* evidence that it was affixed to the deed or other instrument by authority of the corporation: *Sheehan v. Davis*, 17 Ohio St. 571; *Levering v. Mayor*, 7 Humph. 553; *Southern etc. Assn. v. Bustamenti*, 52 Cal. 192; and upon a legal consideration: *Best v. Thiel*, 79 N. Y. 15.

The seal, however, does not make valid and binding upon a corporation a contract or other act which the corporation did not have power to enter into or perform, or which, though it possessed such power, it did not authorize the entering into or performance of. It merely casts upon the corporation the burden of proving that it was not affixed with authority, or, notwithstanding its presence, that the writing in question is not the corporate act: *Conine v. Junction R. R. Co.*, 3 Houst. 288; 89 Am. Dec. 230; *Boyce v. Montauk etc. Co.*, 37 W. Va. 73; *Atlantic etc. Ry. Co. v. St. Louis*, 66 Mo. 228; *Leggett v. New Jersey etc. Co.*, 1 N. J. Eq. 541; 23 Am. Dec. 728. Want of authority on the part of an officer or agent to affix the seal being shown, the instrument has no greater effect, as against the corporation, than has, as against a natural person, a writing which purports to be signed by him, but to which his name was subscribed by a forger, or by a person assuming to act as agent without any authority so to do: *Luse v. Isthmus etc. Co.*, 6 Or. 125; 25 Am. Rep. 506; *Gibson v. Goldthwaite*, 7 Ala. 281; 42 Am. Dec. 592.

A Corporate Seal may Consist of anything found upon a paper, and which appears to have been put there by due authority, or to have been adopted and used by such authority as and for the seal of the corporation. At common law, a seal, whether of a corporation or of a natural person, must have been impressed upon "wax, wafer, or some other tenacious substance." In the United States, at least, this strictness is obsolete, and a seal may be impressed directly upon paper, or may consist of a wafer, or a scroll, or of any other mark which clearly appears to have been intended by the person using it to be his seal. A like change has taken place in the law respecting seals of corporations. It is, indeed, usual in such corporations as have any considerable amount of business likely to necessitate the frequent execution of writings on their part, to have a seal engraved with some appropriate device thereon, and to formally adopt it as the corporate seal, and to impress it directly upon the paper on which the contract or other instrument is written. It is doubtful whether such a seal is anywhere necessary, and certainly in those cases in which it has not been adopted, and where there is no statute expressly requiring its adoption and use, it is not essential, and a corporation, acting by officers or agents who have been

given authority to execute a writing, may adopt, as the seal of the corporation, any wafer, scroll, or other device which might be adopted as the seal of a natural person: *Brinley v. Mann*, 2 Cush. 337; 48 Am. Dec. 669; *Missouri Clay Works v. Ellison*, 30 Mo. App. 67; *Johnston v. Crawley*, 25 Ga. 316; 71 Am. Dec. 173; *St. Philip's Church v. Zion Presbyterian Church*, 23 S. C. 297; *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Hendee v. Pinkerton*, 14 Allen, 381; *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. 52; *South Baptist Soc. v. Clapp*, 18 Barb. 36; *Reynolds v. Glasgow Academy*, 6 Dana, 37; *Warner v. Mower*, 11 Vt. 385. A corporation may authorize the issuing of bonds or other instruments in writing upon which the seal of the corporation, or a fac simile thereof, is printed, and, if so issued, such printed sealing is as effectual as the more formal sealing impressed upon wax: *Royal Bank v. Grand Junction etc. Co.*, 100 Mass. 444; 97 Am. Dec. 115; *Woodman v. York etc. R. R. Co.*, 50 Me. 549; *Hendee v. Pinkerton*, 14 Allen, 381; contra, *Bates v. Boston etc. R. R. Co.*, 10 Allen, 251.

What and Whose Seals may be Used.—There appears to be little or no doubt that the seal of a private person, or of any officer of a corporation by whom a writing is executed, may be adopted and used as the corporate seal, and such apparent conflict of authority as exists upon this subject, we assume to have arisen from writings which have been so executed that it did not appear therefrom that the seal of the natural person by whom the writing was attested was intended to be used as the corporate seal. Thus it has been said that the sealing of an agent will not be accepted as the seal of the corporation: *Savings Bank v. Davis*, 8 Conn. 191, 206; and that, if to a deed purporting to be that of the corporation, the seal affixed is that of the agent who signs it, such seal cannot be treated as that of the corporation: *Richardson v. Scott River etc. Co.*, 22 Cal. 150. This is true if it appears that the seal of the private person has been affixed as his seal, and possibly it may be true where it does not distinctly appear that the seal was intended to be that of the corporation. On the other hand, it is beyond question that a corporation, in the exercise of its power to adopt a seal, may adopt whatsoever seal it chooses, and may, therefore, adopt the seal of one of its officers or agents, and where, from the whole writing, it is evident that the corporation or its duly authorized agents undertook to execute a valid contract and to attest it with a corporate seal, we think that the seal of a private person appearing on the contract will be regarded as having for that occasion been adopted as the corporate seal and therefore the writing must be treated as having been sufficiently and properly signed on behalf of the corporation: *Taylor v. Heggie*, 83 N. C. 244; *South Baptist Church Soc. v. Clapp*, 18 Barb. 36; *Deberry v. Holly Springs*, 35 Miss. 385; *Warner v. Mower*, 11 Vt. 385; *Crossman v. Hilltown etc. Co.*, 3 Grant Cas. 225; *Bank of Middlebury v. Rutland etc. Ry.*, 30 Vt. 159.

Proof of.—It is agreed that the seal of a private corporation does not prove itself, and that the courts do not take judicial notice thereof. Hence, if an instrument is offered in evidence which purports to be executed by a corporation under its seal, and is objected to on the ground that there is no evidence of its execution, nor that the seal impressed upon it is the corporate seal, evidence upon this subject must first be offered before the instrument is entitled to be read in evidence: *Den v. Vreelandt*, 2 Halst. 352; 11 Am. Dec. 551; *Perry v. Price*, 1 Mo. 664; 14 Am. Dec. 316; *Osborne v. Tunis*, 25 N. J. L. 633; *Farmers' etc. Co. v. McCullough*, 25 Pa. St. 303; *Vaughan v. Harkinson*, 35 N. J. L. 79; *Foster v. Shaw*, 7 Serg. & R. 156; *Chew v. Keck*, 4 Rawle, 163; *Leazure v. Hillegas*, 7 Serg. & R. 313; *Crossman v. Hilltown etc. Co.*, 3 Grant Cas. 225. It would seem that there ought to be some difference between seals which are of such form and character and have upon them such inscriptions or devices as on their face to affirm them to be seals of the corporation, and other seals which are not particularly appropriate to the corporation in question; but if there be any such differ-

ence, we have not found any decision affirming or considering it, and the cases we have cited very strangely make no mention of the form of seals offered in evidence and declared not to be admissible, in the absence of proof of their authenticity. If, on the other hand, an instrument is received in evidence without objection that the corporate seal has not been proved, the seal appearing thereon must be presumed to be authentic, or, in other words, to be, at least as to the instrument in question, the corporate seal: *Burnett v. Lyford*, 93 Cal. 114.

If the authenticity of the seal appearing on an instrument is challenged, so that evidence of its adoption is required, such evidence may consist of a resolution of the board of directors adopting it or authorizing its use, or of the testimony of witnesses who know it to be the corporate seal, or to have been used as such by the corporation in the execution of instruments requiring a seal, or of any other facts from which the inference may reasonably be drawn that it was used on the writing in question as and for the seal of the corporation. If the instrument is proved to have been executed on behalf of the corporation by certain of its officers or agents, and they are further shown to have been authorized to act for it in such execution, the seal will doubtless be presumed to be that of the corporation, from the fact that it appears to be on an instrument which they were authorized to execute, and which would not be properly executed by impressing upon it any other than the corporate seal: *Phillips v. Coffee*, 17 Ill. 154; 63 Am. Dec. 357; *Susquehanna etc. Co. v. General etc. Co.*, 3 Md. 305; 56 Am. Dec. 740; *Tenney v. East etc. Co.*, 43 N. H. 343; *Benbow v. Cook*, 115 N. C. 324; 44 Am. St. Rep. 454; *Crumlish v. Railroad Co.*, 32 W. Va. 244; *Musser v. Johnson*, 42 Mo. 74; 97 Am. Dec. 316; *City Council v. Morehead*, 2 Rich. 430; *Osborne v. Tunis*, 25 N. J. L. 633; *Stebbins v. Merritt*, 10 Cush. 27.

The Adoption of the Seal need not be by any formal corporate vote or resolution, for, if any officer or agent is proved to have authority to execute a writing under seal, such authority involves the adoption and use of the means necessary to its successful exercise, and the use by him of anything as a corporate seal is an adoption of such seal, at least for that occasion, and the mere evidence of such use, an adequate proof of such adoption: *Johnston v. Crawley*, 25 Ga. 316; 71 Am. Dec. 173. It may, therefore, happen, in the absence of any corporate vote or resolution adopting a seal, that different instruments executed on behalf of the same corporation may be attested with different seals, and the fact that on previous occasions a particular seal was used by an agent of the corporation, does not prove that another seal affixed to a writing on a subsequent occasion, also by a duly authorized agent, is not, as to that writing, entitled to be regarded as the corporate seal. Where an attempt was made to rebut the presumption that a seal used by an agent acting for a corporation and having authority to execute the writing was the corporate seal, by evidence of the use of a different seal at prior dates, the court said: "The fact that a seal of a particular description had been annexed to three deeds of the corporation at different times, in the absence of any vote adopting or ratifying it, does not prove it to be the corporate seal, to the exclusion of any other mode of ensembling an instrument. The presumption, therefore, arising from the execution of the deed by the agent with a seal purporting to be the common seal of the corporation, is not overcome": *Stebbins v. Merritt*, 10 Cush. 27.

The evidence offered for the purpose of proving that the seal affixed to an instrument purporting to be executed on behalf of the corporation with a common or corporate seal, may consist of testimony tending to show its use by the corporation as such on other occasions, and there is no doubt that such evidence is competent, and need not be restricted to a time anterior to the execution of the instrument in question. There is necessarily a first time in the use of a corporate seal, and to prove that it was such a seal when so used the same evidence is admis-

sible as in other cases. If no formal vote or resolution is produced adopting it, it is sufficient to show that it was afterward employed as a corporate seal, in the transaction of such business of the corporation as required a seal: *Blood v. La Serena etc. Co.*, No. 19,510, 11 Cal. Dec. 242.

PRESBYTERIAN CHURCH v. VENABLE.

[159 ILLINOIS, 215.]

A NAKED POSSIBILITY OF REVERTER is incapable of alienation or devise, but descends to the heirs. Therefore, if real property is conveyed to a corporation whose charter subsequently expires or is forfeited, although the property reverts to the grantor and his heirs, such reverter cannot operate to the advantage of his assignees or devisees.

J. E. Dyas and T. J. Golden, for the appellants.

Dundas & O'Hair, for the appellee.

215 WILKIN, J. This is an action of ejectment in the Edgar circuit court, by appellee, against appellants, to recover possession of certain lands formerly owned by Henry I. Venable, deceased. On June 17, 1848, Henry I. Venable and wife conveyed the premises to James M. Blackburn, Thomas 216 McCord, Leander Munsell, J. W. S. Alexander, E. W. Thayer, and Alanson Baldwin, as trustees of a voluntary association called "Edgar Academy." The deed provided that if the academy should afterward become incorporated, these trustees, or the survivors of them, should convey the premises to such corporation. In 1867, by special act of the legislature, the academy was chartered, and became organized under the name of "Edgar Collegiate Institute," and in 1877 James M. Blackburn, Thomas McCord, and E. W. Thayer, the only surviving original trustees of "Edgar Academy," by quitclaim deeds, and according to the terms of the original deed to them, conveyed all their right, title, and interest to the corporation. The conveyance was by two deeds of exactly the same purport, one being executed by James M. Blackburn and Thomas McCord, living in Edgar county, and the other by E. W. Thayer, in Sangamon county, two days later. The Edgar Collegiate Institute continued to hold the title until 1892, when, by judgment of ouster rendered against it in quo warranto proceedings in the Edgar circuit court, it was divested of all its rights and franchises. On January 13. 1874. long prior to the judgment of

ouster, Henry I. Venable executed his last will and testament, by which he bequeathed all his "estate, real and personal," to his wife, Martha A. Venable. After his death, which occurred in 1884, this will was duly admitted to probate. On January 3, 1894, Martha A. Venable executed and delivered to appellee a quitclaim deed, and she thereupon brought this suit against appellants, who were then in possession. The defendants filed a plea of not guilty, and by agreement the case was submitted to the court without a jury. Judgment was entered for the plaintiff, and the defendants appeal.

As grounds for reversal, defendants invoke the well-settled rule that in this action plaintiff must recover, if at all, upon the strength of her own title, and not upon the weakness of that of the defendants, and insist she has ²¹⁷ failed to prove she had any title whatever to the premises sued for. The soundness of this position depends upon whether or not the title passed to her grantor, Martha A. Venable, by the last will of her husband.

What interest in or title to this land did Henry I. Venable have when he made his will, or at the time of his death, when it took effect? Counsel for appellee suggest the point (though they do not insist upon it), that by his deed to Blackburn and others, trustees of the voluntary association, the title did not pass, but remained in him. Certain provisions of the statute of this state then in force (Rev. Stats. 1845, pp. 284, 614) are cited in support of the suggestion, but wherein these provisions affected the validity of that deed or limited its effect is not pointed out. On its face it was a conveyance of the fee, without any reservation whatever in the grantor. The manifest object of it was to place the absolute fee in the corporation then in contemplation of the parties and afterward duly organized, its charter authorizing it to receive and hold the title to this very land. We find nothing in the statutes referred to which can be held to defeat that purpose. We entertain no doubt that if the deeds from James M. Blackburn, Thomas McCord, and E. W. Thayer were effectual to convey their title to the Edgar Collegiate Institute, it became seised of the absolute fee simple title to the premises, and continued to hold the same until its dissolution, in 1892.

The principal contention of appellee's counsel is based upon the correctness of this position, and they insist that the deed from the original grantees, or the survivors of them, did vest all their title in the incorporated company, and that upon its dissolution it revested in the devisee of Henry I. Venable by re-

verter. Counsel for appellants maintain, that while the fee passed out of Henry I. Venable by his deed to the trustees of the voluntary society, it was not legally conveyed by them to the incorporation, and that the latter did not have title to the property ²¹⁸ when it was dissolved, or at any other time. While we do not concur in that view, we do not deem it important to enter upon a discussion of the question, for the reason that the further contention that the title did not revert to the devisee of Henry I. Venable, if all that is or can be claimed on behalf of appellee is admitted, must be sustained. On that theory the question recurs, What interest or title in and to the premises did Henry I. Venable have when he made his last will and testament, or at the time of his death? That it did not revert to him personally is beyond controversy, because he died long prior to the dissolution of the incorporation. Did he, nevertheless, have such an interest as he could convey, assign, or pass by will? The authorities are clearly to the effect that he did not. He had no future estate in the land, "but only what is called a naked possibility of reverter, which is incapable of alienation or devise," although it would descend to his heirs: Tiedeman on Real Property, enlarged ed., sec. 385. As said in Washburn on Real Property, volume 2, page 739: "So if A sell land to a banking company, and they hold it till their charter expires, it will revert to him or his heirs. But such a right is not a reversion. It is a naked possibility of reverter, which he could not convey or assign": Citing, among other authorities, *Nicoll v. New York etc. R. R. Co.*, 12 N. Y. 121.

It is clear from these authorities, as it seems to me to be upon principle, that Henry I. Venable had no title whatever to the land after he conveyed it to Blackburn and others, and hence conveyed none to his widow, Martha A. It follows that appellee took nothing by her quitclaim deed from the latter. Had Venable died after the dissolution of the Edgar Collegiate Institute, the title would have reverted in him on appellee's theory of the case, and would have passed under his will as after-acquired property. But no such case is presented here.

The doctrine that real estate held by a corporation at its death or dissolution reverts to the original grantor or ²¹⁹ his heirs, recognized by this court in *Mott v. Danville Seminary*, 129 Ill. 403, and other cases, cannot be availed of by appellee in this case. She does not claim title as heir of Henry I. Venable, or through any such heir. Her source of title is the devise to her grantor. For the reasons stated, she acquired no

title from that source, and hence failed to prove, as she alleged, that she was the owner of the premises.

The judgment of the circuit court must be reversed.

Reversed and remanded.

REAL PROPERTY—REVERTER.—Property reverts to the dedicators or their representatives, if the sole use to which it has been dedicated becomes impossible of execution: *Board of Education v. Edson*, 18 Ohio St. 221; 98 Am. Dec. 114.

HERTIG v. PEOPLE.

[159 ILLINOIS, 237.]

AN AFFIDAVIT IS SIMPLY a declaration on oath, in writing, sworn to by a party before some person having authority under the law to administer oaths, and need not be entitled in any particular cause, or in any particular way, or be preceded by any caption.

NOTARIES PUBLIC.—COURTS WILL TAKE JUDICIAL NOTICE of the notaries public in the counties in which they are held.

AN AFFIDAVIT HAVING NO VENUE, but subscribed by a notary public of the county, is good, for the court will take judicial notice that he is a notary of the county, and will presume that he administered the oath only in the county in which he was authorized to act.

THE PRESIDENT OF A CORPORATION owning and publishing a newspaper is a proper person to certify, under oath, to the publication of a notice therein. It is not necessary to affix the seal of the corporation to such verified certificate.

JURISDICTION—COLLATERAL ATTACK.—If, after a proceeding in court confirming an assessment-roll, an application is made to the court for an order authorizing the sale of delinquent property, evidence will not be received to prove that an affidavit of the publication of a notice required to authorize such confirmation was not true.

William T. Donlin and Taylor & McWilliams, for the appellant.

J. D. Adair, for the appellee.

239 BAKER, J. The city of Chicago ordered the laying of water service pipes in Hoyne avenue, in said city, from Archer avenue to Thirty-eighth street, to be paid for by special assessment. Proceedings were had in the county court of Cook county, upon application of the city, and judgment was rendered confirming the assessment-roll. Thereafter, the judgment against certain property of appellant included in the as-

assessment-roll never having been paid, the county treasurer applied to the county court for a judgment of sale of said delinquent property to satisfy the above judgment. Upon this application, judgment was rendered by default. Subsequently, however, the special appearance of appellant was entered, for the sole purpose of attacking the jurisdiction of the court. The judgment of sale was vacated and leave given to file objections instant. The objections so filed were overruled, as were also motions for a new trial and in arrest of judgment, and judgment was rendered, to reverse which appellant brings this appeal.

Two reasons are assigned why the judgment below should be reversed: 1. It is contended that the certificate of publication of the delinquent list is insufficient; and 2. That the certificate of publication filed in the assessment proceedings, and upon which is based the judgment of confirmation, is also insufficient.

²⁴⁰ As to the first contention: The certificate of publication of the delinquent list begins: "I, Frank S. Weighley, president of the Mail, a corporation publishing a newspaper known as the Chicago Mail, do hereby certify," etc., and concludes:

"In witness whereof, I have hereunto set my hand this fifteenth (15th) day of June, A. D. 1895.

"FRANK S. WEIGHLEY,

"President of the Mail.

"Subscribed and sworn to before me this 15th day of June, A. D. 1895.

(Seal)

"A. L. WOODWARD,

"Notary Public."

The objections made to it are, that the jurat fails to state the venue, that it does not appear that the affiant was a proper person to make the certificate, and that it should have been sealed with the corporate seal.

Section 186 of the revenue act provides that the printer, publisher, or financial officer or agent of the newspaper publishing the list of delinquent lands shall attach his certificate, under oath, to a copy thereof, and that the same shall be filed as a part of the records of the court. In *Harris v. Lester*, 80 Ill. 307, it was said that "an affidavit is simply a declaration, on oath, in writing, sworn to by a party before some person who has authority, under the law, to administer oaths," and it was held that it need not be entitled in any cause or in any particular way, and that "without any caption whatever, it is, nevertheless, an affidavit." In *Schaefer v. Kienzel*, 123 Ill. 430, it was held that where an affidavit was made before a notary public in the

county in which the court was held that entertained the proceeding, the jurat of the notary need not be authenticated by his notarial seal—that the court would take judicial notice of who the notaries public were in the county in which the court was held. To the same effect were the earlier decisions in *Stout v. Slattery*, 12 Ill. 162, and *Rowley v. Berrian*, 12 Ill. 198. See, also, *Jackson v. Cummings*, 15 Ill. 449. Following the rule above laid down, we must hold that the county court of Cook county ²⁴¹ will take judicial notice that “A. L. Woodward, Notary Public,” is a notary for that county. Being a public officer, it will be presumed he administered the oath in the county within which he was authorized to administer oaths, for the presumption is, that he has done his duty.

It is urged that it does not appear from the certificate that Frank S. Weighley was a proper person to make it, and that it should have been sealed with the corporate seal of the Mail. The case of *Fox v. Turtle*, 55 Ill. 377, relied upon by appellant, is not in point. There the certificate was signed, “John Wentworth, publisher, by Reed,” and it did not appear who Reed was, or that he was in any manner connected with the newspaper. It did not purport to be given by the publisher, but by another person who used his name, and his authority to do so did not appear, and for that reason the court held it to be defective. In the certificate under consideration, on the contrary, the person certifying describes himself as president of the corporation, and in that capacity signed his name. His official connection with the newspaper therefore appears. As president of the corporation, he was certainly its agent, within the meaning of the statute, and consequently a proper person to make the certificate: *Smith v. Smith*, 62 Ill. 493. The matters set forth in the certificate were certified to by an individual. The corporation could certify to nothing. To have sealed the certificate with the corporate seal would, therefore, have been an unnecessary, if not an absurd, proceeding.

As to the second contention: Appellant claims that the matters set forth in the certificate of publication filed in the confirmation proceedings are false, and the certificate, therefore, insufficient. At the hearing of this cause, he called one B. McWilliams, in order to prove by him that between the dates February 3 and February 9, 1893—the dates within which the certificate of publication alleged the notice to have been published—no notice appeared in the files of the Chicago Mail. The court, on ²⁴² appellee’s objection, refused to hear such testi-

mony. In this the court did not err. The proper time to have tendered such testimony was at the hearing of the confirmation proceeding. As it was, the offer came too late, for this is a collateral proceeding, in which it is sought to attack the jurisdiction of the court to render the judgment. In the record of the confirmation proceeding there appeared a certificate which was sufficient if true, and the judgment recited that the facts alleged in such certificate were true; consequently, it will be assumed that the court had sufficient evidence before it to warrant the rendering of judgment. Even were the certificate in fact insufficient, appellant could take no advantage of it in this, a collateral, proceeding, for in such a case the presumption would be that the court heard and acted upon other and sufficient evidence to sustain the findings: *Barnett v. Wolf*, 70 Ill. 76; *Harris v. Lester*, 80 Ill. 307.

We find no error in the record, and the judgment of the county court will be affirmed.

AFFIDAVIT—WHAT IS.—An affidavit is a voluntary oath reduced to writing, taken before some authorized officer, and certified by him: *Shelton v. Berry*, 19 Tex. 154; 70 Am. Dec. 326, and note.

AN AFFIDAVIT CANNOT BE USED IN A CAUSE UNLESS IT IS PROPERLY ENTITLED, and the title should be of the cause in which it is to be used: *Watson v. Roessig*, 24 Ill. 281; 76 Am. Dec. 746. As a general rule, an affidavit must be entitled in the suit in which it is to be used. Still, if no suit is pending, at the time, it need not be entitled; but, if a suit is pending, and the affidavit is entitled in a suit not pending, it is a nullity: *Beebe v. Morrell*, 76 Mich. 114; 15 Am. St. Rep. 288.

JUDICIAL NOTICE—NOTARIES PUBLIC.—The circuit courts of Illinois take judicial notice of who are notaries within the county where the court sits: Extended note to *Lanfear v. Mestier*, 89 Am. Dec. 685.

PALMER v. COOK.

[159 ILLINOIS, 800.]

AN ESTATE CANNOT BY DEED BE LIMITED OVER TO another after a fee already granted.

THE TERM "REMAINDER," NECESSARILY IMPLIES what is left, and, if the entire estate is granted, there can be no remainder.

CONVEYANCE—REPUGNANCY.—IF THE TERMS USED IN A DEED VEST THE FEE IN THE FIRST TAKER, other parts of the instrument showing an intention to give a less estate must be disregarded. Therefore, if a deed purports to convey real property to two grantees, but contains a clause declaring that, in case either grantee dies without heirs, her interest shall vest in the survivor, such clause is not wholly inoperative.

Peebles & Peebles and A. N. Yancey, for the appellant.

Rinaker & Rinaker, for the appellee.

³⁰² PHILLIPS, J. Appellee filed a bill for dower and partition of certain lands alleged to have belonged to Emily C. Cook at the time of her death, he being her surviving husband. Her title was acquired by the following deed:

"The grantor, Thomas Stewart, of, etc., for and in consideration of one dollar in hand paid, doth hereby grant, bargain, sell, convey, and warrant to Mary A. Stewart and Emily C. Stewart, of Macoupin county, the following real estate, to wit: The southwest quarter of the northwest quarter of section 14, and the southeast quarter of the northeast quarter of section 15, all in township No. 12 north, range 8 west, in Macoupin county, state of Illinois. And I, Thomas Stewart, as for myself, retain possession and reserve the use, profits, and full control during my life; and further, in case either of the grantees dies without a heir, her interest to revert to the survivor.

"Dated this 10th day of March, 1883.

"THOMAS STEWART. (Seal)"

The trial court held the fee vested in the grantees, and decreed dower and partition. This appeal is prosecuted.

Appellee insists that the deed conveys the title in fee simple to the grantees therein, and that the last clause in the deed, containing the following words, to wit: "And further, in case either of the grantees dies without a heir, her interest to revert to the survivor," is inoperative and void. He alleges that he is the owner, as such heir to his deceased wife, of the undivided half of the undivided half of said lands above mentioned. Appellant denies the right of appellee to any right, title, or interest of, in, or to the said tracts of land in said deed mentioned. Her contention is, that, by the deed from Thomas Stewart to her and the deceased wife of appellee, the grantees took simply a life estate, with a contingent remainder to the survivor in fee.

³⁰³ By the thirteenth section of chapter 30 of the Revised Statutes it is provided: "Every estate in lands which shall be granted, conveyed, or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." By section 9 of the same chapter the words "convey and warrant" to the grantee are declared to be a conveyance in

fee simple to the grantee, his heirs and assigns, with certain covenants, etc.

This deed is clearly within the letter and spirit of section 9, and, by the two sections above named, a fee simple estate was vested in the grantees. It is an established principle of construction of contingent remainders, that an estate cannot, by deed, be limited over to another after a fee already granted. The term "remainder" necessarily implies what is left, and, if the entire estate is granted, there can be no remainder. This deed effected an absolute fee simple conveyance by the first clause of the deed and vested the estate. By the last clause an attempt is made to mount a fee upon a fee, which can only be done by executory devise: *Smith v. Kimbell*, 153 Ill. 368; *Fowler v. Black*, 136 Ill. 363; *Griswold v. Hicks*, 132 Ill. 494; 22 Am. St. Rep. 549. It is a further principle of construction of deeds, that if the terms used vest a fee in the first taker, other parts of the instrument showing an intention to give a less estate will not control: *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92. Under the statute, the conveyance being to the grantee and her heirs and assigns, the terms have, in law, a definite meaning. By the use of terms of a definite legal meaning, the intention can be determined from the language used. If that language means a certain thing, and nothing else, then the only reasonable construction is, that what was intended was expressed in the language used. The ³⁰⁴ language used did not create an estate in joint tenancy nor a life estate.

Under these principles, this deed reserved to the grantor a life estate and vested a fee in the grantees, and the clause, "and further, in case either of the grantees dies without a heir, her interest to revert to the survivor," must be held to be inoperative, as a limitation of the fee.

The decree of the circuit court is affirmed.

ESTATES—LIMITATION OVER AFTER FEE GRANTED.—If the first taker under a will is given an estate in fee or for life, coupled with an unlimited power of disposition, the fee or absolute estate vests in the first taker, and any limitation over is void: *Bradley v. Carnes*, 94 Tenn. 27; 45 Am. St. Rep. 696, and note; *Combs v. Combs*, 67 Md. 11; 1 Am. St. Rep. 359, and especially note.

BARRETT v. MT. GREENWOOD CEMETERY ASSOCIATION.

[159 ILLINOIS, 385.]

WATERS AND WATERCOURSES, POLLUTING.—The owner of lands through which flows a brook or small watercourse is entitled to an injunction to prevent the owners of a cemetery from constructing a sewer through and over their premises, so as to drain into the brook, if the effect of such sewer must be to carry poisonous exhalations from decomposing human bodies into the watercourse, thereby polluting its waters.

WATERS AND WATERCOURSES, FURTHER POLLUTION. The fact that a watercourse is already polluted and contaminated by various causes does not entitle other persons to add thereto, nor preclude persons through whose lands the watercourse flows from obtaining relief by injunction against its further pollution.

NUISANCES—CUMULATIVE REMEDIES.—The equitable remedy to prevent the creation or continuation of a nuisance is not taken away by a statute giving a remedy by indictment.

INJUNCTIVE RELIEF MAY BE GRANTED TO PREVENT A LANDED PROPRIETOR FROM CAUSING filthy and contaminated water to percolate from his soil into the adjacent lands, to the injury of his neighbor.

NUISANCES.—AN INCORPORATED CITY OR TOWN WILL NOT BE PERMITTED to empty its sewage into a stream of water, where the result is the pollution thereof.

A NUISANCE CANNOT BE AUTHORIZED BY A CONTRACT between a municipality and a cemetery association, to the injury of a third person.

Whitehead & Stoker and W. H. Holden, for the appellants.

Runyan & Runyan, for the appellees.

Holden & Buzzell, for the appellee town of Worth.

³⁸⁶ **CARTER, J.** This was a bill in equity, filed in the circuit court of Cook county by certain landowners, who are appellants here, to enjoin appellees, two cemetery corporations, from constructing a certain sewer so as to drain their cemeteries, and especially to underdrain certain wet and swampy portions thereof, used and to be used in burying the dead, into a running stream of water flowing through appellants' lands. The sewer empties into the brook where it crosses Morgan avenue, above appellants' lands, and is being constructed eastward along said avenue between said cemeteries, with lateral extensions or spurs extending into the cemeteries for drainage, and especially designed to drain certain swampy portions thereof as appear unfit for burial purposes unless underdrained. The sewer is being constructed under a contract between the two cemetery compa-

nies of the one part and the commissioners of highways of the town of Worth of the other part, whereby the former are to construct the sewer at their own expense, and to pay all damages to private property, and the town is to keep the same open and in repair for the use of the cemetery companies, and the adjoining property owners are to have the right to connect.

There is but little dispute as to the law of the case, the controversy relating chiefly to matters of fact. The testimony was taken by the master to whom the cause was referred. Many witnesses were examined, and the evidence is too voluminous to be set out to any considerable extent here. The testimony shows, however, that said brook is a small, shallow stream, which rises north of Morgan avenue or One Hundred and Eleventh street, in the town of Worth, and flows southerly, fed by springs along its course, across said avenue through the sixty acres of land owned by complainant G. D. Barrett, thence south through a one hundred acre tract owned by complainant W. B. Brayton, and across Raymond avenue or ³⁸⁷ One Hundred and Fifteenth street, and through land owned by complainant Saxton, and thence through an eighty acre tract owned and occupied by complainant Ira S. Brayton and eighty acres owned and occupied by Friederich Joehnke; thence across Lyon avenue or One Hundred and Nineteenth street, over a forty acre tract owned by complainants John T. Dale and George D. Robinson. South of Morgan avenue, two and one-half miles in a direct line, but four miles by the brook, complainant August C. Roeber occupies a block of ground, on which he has constructed icehouses, and where he conducts an ice business of five thousand dollars or six thousand dollars a year. The brook that runs through the lands of other complainants north of his premises empties into Stony creek about three-fourths of a mile above his place. He has harvested ice from Stony creek, and sold the same in Chicago and vicinity for fourteen years past, for refrigerator and domestic purposes. The lands of the other complainants are used for pasturage and farming purposes, and the water of the brook is used for stock, and to some extent is used in the homes of the occupants of the land for domestic purposes. This brook running through said lands receives the washings of the streets, and from manured lands used for raising cabbages adjoining it north of the land of complainants, and in times of freshets the brook is muddy, but is clear in its natural condition. Ditches have been constructed along Morgan avenue, and surface water coming south on Johnson avenue, which intersects

Morgan avenue, is carried along these ditches into the brook. Dr. Bayard Holmes testified, as an expert bacteriologist, that bodies buried in boxes of wood would sooner or later be so liquefied as to be practically incorporated with the soil in which they were buried, and that the subterranean drainage of a cemetery draining into a sewer of brick and mortar, as ordinarily built, if drained into a spring brook, would carry contamination and pollute such brook for five miles or more, and that brook, being dammed for ice ³⁸⁸ making within four miles from the cemetery, would result in a pond from which ice of a very pernicious quality would be harvested; that the water from a brook into which such sewage drained would be unhealthy for cows, and unfit for drinking purposes or for cooking water for domestic use. The testimony of other witnesses showed that the lands through which the brook runs into which the drainage from the cemeteries emptied, would be unfitted for dairy purposes and stockraising by reason of the contamination of the water by the sewage.

We have read and considered all the evidence with care, and are of the opinion that it sustains the conclusions reached by the master. In his report, the master found "that injurious products of decomposition do emanate from animal bodies buried in the earth; that these emanations do enter into the soil in which said bodies are buried; that the surface water percolating through the soil takes up these emanations; that if the sewer referred to is constructed, with the lateral drains extending into the said cemeteries referred to in the bill of complaint filed in this cause, these unwholesome products of decomposition will percolate through the soil and penetrate the sewer, and will be carried by the said sewer and emptied into the spring brook, and that the contents of the said sewer will contaminate the waters of the spring brook to a greater extent than they are now contaminated from any cause shown to exist, and will contaminate the waters of the said spring brook to a greater extent than they would be contaminated from any natural cause or from any conditions existing prior to the construction of the proposed sewer"; that the preponderance of the evidence on the main issue was in favor of the complainants, and that the material allegations of their bill were sustained. The circuit court sustained exceptions to this report and dismissed the bill, and its decree has been affirmed by the appellate court.

³⁸⁹ We think there was error in affirming the decree. The very purpose of the sewer was to furnish underdrainage, as well

as surface drainage, to these cemeteries. Some portions of their grounds were so wet and swampy that water would rise in openings for graves, when dug, to such an extent as to compel their abandonment and the selection of more elevated ground in their stead. It is true, it was shown that some of the highways of the town would be drained and benefited; but the chief purpose and object in view were to furnish cemetery drainage, and, to accomplish this, the cemetery companies were willing and agreed to pay the whole expense. Experienced bacteriologists testified that, if the sewer were constructed and finished as contemplated, poisonous exudations would be carried from decomposing human bodies, by the percolating waters, into the sewer and from thence into the spring brook, polluting and contaminating its waters and rendering them unfit for use for man or beast, and dangerous to the health of those who should use the water for drinking or domestic purposes, or who should use the milk of cows that drank from the brook, and that ice which should be harvested from ponds formed by the brook upon the lands of complainant Roeber would be of a very pernicious quality.

There was some conflict in the evidence on the question as to whether or not the stream would be thus polluted by the sewer, but we think the clear preponderance of the evidence sustains the finding of the master that it would be. It would also seem to accord with the common opinion of mankind that underdrains in wet and marshy land filled with decaying bodies, leading into a running brook flowing within a mile of such land, would pollute the waters of the brook. The evidence does not show, nor does experience or science appear to teach, just how far this pollution would continue in the flowing waters. One witness testified that it might continue from five to fifty miles before the purification would become complete. ³⁹⁰ But we think it clearly appears that the waters would probably be contaminated by this sewer while flowing through the lands of all of the complainants. Some of these lands were immediately below the mouth of the sewer, and the farthest within four miles. The brook is small, but perennial. It is fed along its course, below the mouth of the sewer, by small springs of pure water rising from the bed of the stream. It flows through the private property of complainants. They used its waters for stock, for cows kept for dairy purposes, for making ice, and, at times, for domestic use.

The defendants attempted to break the force of the case made

by complainants by showing that the waters of the brook and the springs along its course were already polluted by the washings from manured lands used in gardening, and from decaying vegetables and other refuse matter, and were successful in showing that, in wet weather, the waters of this stream were rendered impure from these causes. They also showed that another drain of a somewhat similar kind, from Mount Hope Cemetery, discharged its waters into a ravine which, in wet weather, carried such waters into the brook in question at a point below the land of some of the complainants and above that of others. But we know of no rule of law that sanctions one wrong because another has preceded it. It is doubtless true that streams of water cannot be kept as pure when flowing through lands occupied by populous communities as when flowing through sparsely settled lands; but these effects that unavoidably arise from the occupation and cultivation of the soil by man do not justify the deliberate pollution of a stream of water flowing through private property, in order that the interests of private persons, or even of the public, may be enhanced thereby. There are very few streams of water flowing through a densely populated country which are not more or less polluted from general causes arising from the occupation and cultivation of the adjacent lands. The ³⁹¹ courts have no power to prevent pollution so occurring: 28 Am. & Eng. Ency. of Law, 971, note; *Baltimore v. Warren Mfg. Co.*, 59 Md. 96. But it is a well-recognized branch of equity jurisdiction to restrain, by injunction, the fouling of running streams that pass over the lands of others, by connecting sewers therewith, or by other means, so as to endanger the comfort and health of others or to cause irreparable injury to their property rights: 2 High on Injunctions, secs. 794, 795, p. 508; *People v. St. Louis*, 5 Gilm. 351; 48 Am. Dec. 339; *Wahle v. Reinbach*, 76 Ill. 322; *Metropolitan City Ry. Co. v. Chicago*, 96 Ill. 620; *Minke v. Hopeman*, 87 Ill. 450; 29 Am. Rep. 63; *Catlin v. Valentine*, 9 Paige, 575; 38 Am. Dec. 567; *Lyon v. McLaughlin*, 32 Vt. 423; *Dwight v. Hayes*, 150 Ill. 273; 41 Am. St. Rep. 367. And the mere fact that in the case at bar the waters of this stream may, to some extent, have been rendered unwholesome when flooded by the washings from manured lands, or by the connection of other drains, is no excuse for the threatened pollution by the cemetery companies: 28 Am. & Eng. Ency. of Law, 968, 974. It is declared by section 221 of the Criminal Code to be a public nuisance "to corrupt or render unwholesome or impure the water of any spring, river, stream, pond, or lake, to the injury or pre-

judice of others," and the offense is punishable by indictment, but the "bare fact that the statute gives a remedy by indictment does not deprive the court of its equitable powers": *Minke v. Hopeman*, 87 Ill. 450; 29 Am. Rep. 63. In *Wahle v. Reinbach*, 76 Ill. 322, 325, it was held that a bill would lie to enjoin the erection of a privy so near to complainant's dwelling and well of water as that it would become injurious to the health and comfort of himself and family, and, after citing previous decisions of this court, it was said: "These cases, however, recognize the doctrine, which is supported by all the authorities on this branch of equity jurisdiction, that where the injury resulting from the nuisance is, in its nature, irreparable, as, when loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin ³⁹² to property will ensue from the wrongful act or erection, courts of equity will interfere, by injunction, in furtherance of justice and the violated rights of property." Injunctive relief will be granted to prevent one proprietor from causing filthy or contaminated water to percolate from his soil into adjoining lands, to the injury of his neighbor: 27 Am. & Eng. Ency. of Law, 437.

The evidence does not sustain appellee's contention that the purpose of the sewer is mere surface drainage, or the carrying off more rapidly of waters from the surface of the cemetery grounds which, by the slower processes of percolation and natural drainage, would eventually find their way to the same stream and in a more impure condition. The contract shows that the sewer was to be at all times kept open, and to be used by the two cemeteries for carrying away all surface water and as a drain for said cemeteries, and the plan and purpose of construction show that one of its principal objects was the underdraining of the wet and swampy portions of the cemeteries, and much the larger portion of the evidence relates to the effect the decaying bodies buried in the cemetery would have on the percolating waters which it is intended the sewer should carry off into this brook.

In *Robb v. La Grange*, 158 Ill. 21, it was said: "Under the ruling of this court, which we believe to be in harmony with the current of authority bearing on the question, a village or city cannot run its sewage beyond the incorporated limits and empty it on the adjoining premises of some landowner, where a stench is created and the sewage is detrimental to the health of the neighborhood. Nor will a village or incorporated town be permitted to empty its sewer into a stream of water, where the result is the pollution of the stream. In other words, if a nuisance is established by carrying the sewer of a village, incorporated town,

or city in a drain or sewer beyond the limits of the incorporation, a bill in equity will lie on behalf of any person injured. The real ³⁹³ question in the case then is, whether the evidence is sufficient to establish a nuisance." And, in view of the fact that the witnesses were examined in open court, in that case, when the cause was heard, and that the trial judge, at the request of the parties, went upon the locus in quo and personally viewed the premises, and found, as a matter of fact, that no nuisance was created, this court declined to reverse such finding, but did hold that in view of the fact that the bill was filed before the sewer was completed, and the trial was had before it could be satisfactorily determined whether the final result of the sewer would be to create a nuisance or not, the bill should have been dismissed without prejudice.

Under the facts proved in the case at bar, we are satisfied, as found by the master, that a nuisance would be created, and that the decree should have been for the complainants.

The town of Worth filed a cross-bill to set aside the contract, on the ground that the commissioners had no power to make it, and because it was not made or authorized at any meeting of the commissioners. It is plain that neither party had any right, by contract, to authorize the pollution of the stream in question. But we see no occasion for setting aside the contract. It will be time enough to consider how far the town is bound when its liability under the contract is asserted or denied in some proceeding making such consideration necessary. We hold, therefore, that the circuit court erred in dismissing the bill of complaint, but did not err in dismissing the cross-bill.

The judgment of the appellate court and the decree of the circuit court, except as to the dismissal of the cross-bill, are reversed, and the cause is remanded to the latter court, with directions to enter a decree in accordance with the prayer of the bill of complaint.

WATERS—POLLUTION.—AN INJUNCTION will lie to restrain the pollution of the waters of a stream by emptying therein the sewage of a city, thereby rendering the waters unwholesome and unfit for use, and creating a private nuisance in the premises of a landowner over which the stream flows: *Village of Dwight v. Hayes*, 150 Ill. 273; 41 Am. St. Rep. 367, and note.

EASEMENT—RIGHT OF MUNICIPALITY TO POLLUTE WATERS OF STREAM.—The right of a village to pollute the waters of a stream, by the discharge of sewage in it, is in the nature of an easement, which can be created only by grant or prescription: *Village of Dwight v. Hayes*, 150 Ill. 273; 41 Am. St. Rep. 367. That a city is liable in damages for the pollution of the waters of a natural stream by the emptying of its sewage therein, see *Good v. Altoona City*, 162 Pa. St. 493; 42 Am. St. Rep. 840, and note.

ABT v. AMERICAN TRUST & SAVINGS BANK.

[159 ILLINOIS, 467.]

BANKING.—A CHECK DRAWN FOR VALUE BY A DEPOSITOR in a bank operates, pro tanto, in Illinois as an assignment of the funds of such depositor in such bank, but the law is otherwise in New York.

CONFLICT OF LAWS—BANKING.—A CHECK DRAWN IN ILLINOIS on a New York bank, and payable there, is controlled by the laws of the latter state, and therefore does not take effect as an assignment, pro tanto, of the funds of the drawer in a New York bank, though it would have effected such an assignment under the laws of Illinois had the check been drawn upon a bank doing business therein. Nor are the rights of the drawee increased by the fact that the bank in New York has paid the funds which were therein, to an assignee for the benefit of creditors under an assignment made in the state of Illinois.

Moses, Pam & Kennedy, for the appellants.

Moran, Kraus & Mayer, for the appellee.

468 **CARTER, J.** This was a petition in the county court of Cook county, filed by appellants, for an order to compel the American Trust and Savings Bank, assignee for the benefit of creditors of the insolvent banking firm of Herman Schaffner & Co., to pay to petitioners the amount of eight certain drafts, which they had bought of Schaffner & Co., and which the latter had drawn on the American Exchange National Bank of New York in favor of petitioners. The petitioners forwarded the drafts to various persons in due course of business, but before they were presented to the drawee for payment, Schaffner & Co. failed and made a voluntary assignment to appellee for the benefit of their creditors, and the drawee, having notice thereof, refused payment. The total amount of the eight drafts was two thousand seven hundred and ninety-nine dollars and seventy-seven cents, and the total amount of funds of the drawer on deposit with the drawee was then eighteen hundred and sixty-six dollars and sixty-two cents, but the amount of this deposit was increased to five thousand nine hundred and seven dollars and seventy-three cents by collections made subsequently to the assignment. Payment of the drafts having been refused, they were returned to the petitioners, who were compelled to make payment themselves. It was admitted on the trial, that, prior to the drawing of the eight drafts in favor of appellants, the drawer had drawn sixty-two other drafts in favor of various parties, aggregating three thousand two hundred and ninety-three dollars and ninety-three cents, on the same drawee, and which were

presented for payment, and payment refused, ⁴⁶⁹ before any of said eight drafts were presented, but that so far no one had appeared to claim any preference on account of any of such prior drafts.

It is not, of course, denied that petitioners are creditors of the insolvent firm and entitled to share with the other creditors in the assets of the estate, but petitioners insist that by drawing in their favor the drafts on the bank in New York, Schaffner & Co. assigned to them the funds so on deposit in the New York bank—in other words, set apart and appropriated said funds to or toward the payment of said drafts, and that the payees thereupon became entitled to the funds, and that it is the duty of the assignee to pay out the same to the petitioners. It is settled law in this state that a check drawn for value by a depositor on a bank operates as an assignment, pro tanto, of the funds of the depositor on deposit in such bank in favor of the holder of the check: *Brown v. Leckie*, 43 Ill. 497; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212; 22 Am. Rep. 185; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483. But it was admitted on the trial, and the decisions of the courts of New York show, that the rule is otherwise in that state: *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325; 27 Am. Rep. 55; *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; 7 Am. Rep. 314; *People v. Merchants' etc. Bank*, 78 N. Y. 269; 34 Am. Rep. 532; *First Nat. Bank v. Clark*, 134 N. Y. 368.

The assignee, who is appellee here, contends, that as the funds on which the drafts were drawn were in New York, in the hands of the drawee there, the contract was to be performed in that state, and must be governed by its laws, and that by such laws there was no assignment or transfer of the funds to the holder of the drafts, and therefore that appellants did not, upon taking up such drafts, have any more right to such funds than the other creditors of the insolvent firm. In support of this contention, *Bank of America v. Indiana Banking Co.*, 114 Ill. 483, is cited. In that case it was held that a check drawn in Indiana on a bank in Illinois would operate to transfer ⁴⁷⁰ the fund, on the ground that the law of the place where the contract was to be performed must govern, the law of Indiana being, as in New York, that checks do not operate to assign the deposit, or a sufficient part thereof to pay them. It is, however, insisted by appellants, that as this is not a proceeding against the New York bank, but against the assignee, to compel delivery to them of such funds in the hands of the assignee in this state, the laws of New York have

no application. The case is doubtful on the facts. But be that as it may, we are of the opinion that the law is against the appellants. The drafts, though drawn in this state, were drawn on the New York bank, and were payable there. The contract was to be performed in New York, and it must be presumed that upon a question of this character the parties contracted with reference to the laws of the state where the contract was to be performed, rather than with reference to the laws of the state where the contract was made: *Mason v. Dousay*, 35 Ill. 424; 85 Am. Dec. 368; *Lewis v. Headley*, 36 Ill. 433; 87 Am. Dec. 227; *Adams v. Robertson*, 37 Ill. 45; *Roundtree v. Baker*, 52 Ill. 241; 4 Am. Rep. 597; *Davenport v. Karnes*, 70 Ill. 465; *Evans v. Anderson*, 78 Ill. 558. Such being the law, and such being the contract, we do not think that the payment of the funds by the New York bank to the assignee in this state, even if the facts showed such payment, would give appellants any right to the funds which they did not have before such payment. As to whether or not the sixty-two drafts drawn prior to those of appellants would of themselves defeat the petition of appellants it is unnecessary to consider.

We are satisfied that the case was correctly decided in the courts below, and the judgment of the appellate court will be affirmed.

CHECK AS ASSIGNMENT OF FUND.—A check drawn by a depositor on the bank, unless it has been accepted, does not constitute an assignment so as to vest the fund or credit against which it is drawn, or any part thereof, in the payee or holder: *Bank v. Windisch-Muhlhauser Brewing Co.*, 50 Ohio St. 151; 40 Am. St. Rep. 660, and note; *Akin v. Jones*, 93 Tenn. 353; 42 Am. St. Rep. 921. See, also, the extended notes to *Hemphill v. Yerkes*, 19 Am. St. Rep. 609, and *In re Franklin Bank*, 19 Am. Dec. 422.

CHECKS—CONFLICT OF LAWS.—The indorser of a check drawn in New York on a bank in Connecticut, payable at a future day and presented on that day, followed by dishonor and due notice, is liable if the law in Connecticut did not allow grace on such instruments: *Bowen v. Newell*, 13 N. Y. 290; 64 Am. Dec. 550, and note.

GREEN v. HEDENBERG.

[159 ILLINOIS, 489.]

CORPORATIONS—STOCKHOLDER'S SUIT.—If the officers of a corporation wrongfully deal with its property, to the injury of the stockholders, they may maintain a bill against the corporation and its officers for relief against such misappropriation. Before bringing their bill, they should make demand on the proper officers of the corporation to bring it, but if it is reasonably certain that such demand would be unavailing, it need not be made.

ONE HOLDING STOCK AS COLLATERAL SECURITY only is entitled to the same remedy by suit to obtain relief against the misappropriation of funds and property of the corporation as any other stockholder.

ESTOPPEL.—THE FACT THAT THE COMPLAINANT WAS SILENT when other parties stated their purpose to use moneys of the corporation in making payment for corporate stock does not estop him from maintaining suit to prevent or redress such misappropriation.

PRACTICE.—THE DISMISSAL OF A BILL AS TO PART OF THE DEFENDANTS by consent will not prevent the court from granting relief against other defendants, not so connected with those dismissed that the latter continue to be necessary parties to a final decree.

French, Teller & Brown, for the appellant.

Edgar B. Tolman, for the appellee.

480 WILKIN, J. This is a bill in chancery by appellee, as a stockholder, against the Nutting Electric Manufacturing Company and its officers and directors, charging them with misappropriation of corporate funds to his prejudice, and praying relief. The decree of the circuit court was according to the prayer of the bill, and has been affirmed by the appellate court.

The material facts set up in the bill are, that the capital stock of the corporation, consisting of 1,000 shares of \$100 each, were, on April 13, 1893, held by two rival factions—complainant, his son, James W. Hedenberg, and his son in law, Jason R. Prindle, being the owners of 536 shares, and William H. Foulke, Samuel E. Nutting, Frank A. Smith, S. D. Brown, and Nellie C. Bonner, the owners of the remaining 464 shares. At that time, the last-named parties, with W. C. Green, A. S. Nutting, A. W. Bonner, P. L. Taylor, and D. B. Switzer, through complainant, acting for himself and his son in law, purchased all the shares owned by the parties first named, agreeing to pay therefor \$40,000—\$15,000 in cash and \$25,000 in notes, secured by the stock so purchased and 214 additional shares delivered to him as collateral. Upon the consummation of this sale, complainant, who was then president, and his son in law, Prindle, who was then secretary of

the company, resigned, and appellant, W. C. Green, was elected president and W. H. Foulke secretary. Two others of the purchasers were made directors. Frank A. Smith was then treasurer, and continued to be an officer ⁴⁹¹ of the company. At this time, there was due the company certain insurance money, amounting to \$15,200, and it is alleged in the bill that that money was afterward wrongfully applied by the president, Green, and the treasurer, Smith, with the consent and concurrence of the other directors, upon the purchase price of said 536 shares of stock. The bill alleges that the total cash assets of the company at that time were \$21,648.43, other personal property \$3,000, and patents of great value, but does not state their value. It is further alleged that on November 3d following the purchase of the stock from complainant, \$50,000 in bonds were issued by the officers and directors of the company, secured by a chattel mortgage, in which Eugene Clifford was named as trustee, for the purpose of raising funds to pay a debt of \$6,600, pretended to be due and owing by the company, and it is alleged that if the \$15,200 had not been misappropriated as stated, no necessity whatever would have existed for the issue of the bonds, even though the indebtedness really existed. It charges certain fraudulent transactions in regard to those bonds by Clifford, William H. Pope, and A. Emma Smith, wife of Frank A. Smith, and these parties were made defendants to the bill. They answered denying its allegations as to them.

The company, Samuel E. Nutting, W. H. Foulke, P. L. Taylor, W. C. Green, Frank A. Smith, and A. W. Bonner filed a joint and several answer, in which they admit the ownership and purchase of the shares of stock on April 13, 1894, substantially as alleged, but aver that the said purchase was in fact by the company, and not by the individuals in whose names the transaction was had; "they admit the \$15,200 paid to complainant for the stock purchased was taken from the funds of the company by said Green, acting as president, and William H. Foulke, acting as treasurer, . . . and admit that the money was taken with the concurrence and assent of the board of directors; aver that it was also taken with the consent ⁴⁹² and concurrence, and at the request, of every one of the stockholders, and with the full knowledge and consent of complainant, James W. Hedenberg, and Prindle; . . . they admit that, if the \$15,200 had been in the treasury, there would have been no necessity to issue the bonds or make the assignment of patents, but deny that there was any misapplication or misappropriation of the funds of the

company, and deny that the bonds, mortgage, or assignment of patents were made pursuant to any fraudulent scheme or plan to depreciate the stock or wreck the company, or for any other fraudulent or unlawful purpose, and aver that the same were made to raise money for the legitimate use of the company, and for no other purpose, and they admit that the officers and directors hypothecated all of said bonds referred to, with the Central Trust Bank, as security for a debt owing said bank of \$6,524.50, but deny that it was done pursuant to any unlawful or fraudulent scheme or conspiracy of any kind, and aver that it was necessary for the company to raise money to that extent for its use, and that they had no other security to offer; they admit that, if the money had not been taken from the assets, no occasion would have arisen to pledge the bonds, but aver that the money taken and paid to complainant and his associates was taken with their concurrence and consent, and for their use and benefit, and not for the benefit of the other stockholders, and complainant ought to be estopped from in any way questioning the validity or rightfulness of the transaction"; they admit the assets of the company to be substantially as alleged in the bill, and say "that the value of the stock is mainly speculative, resting upon the value of certain patents owned by the company." Other allegations appear in the bill, and the answer sets up many facts not here referred to, which, in our view of the case, are not of controlling importance.

The cause was referred to the master to take and report the testimony, with his conclusions, and he reported, ⁴⁹³ among other things, his finding to be, that the purchase of the 536 shares of stock was, in fact, made for the company, and he also found that the appropriation of the \$15,200 to the cash payment therefor was with the consent of complainant and those for whom he acted. His report, which was very voluminous, was excepted to by the complainant, which exceptions the master overruled, but, on their being renewed before the court, were sustained, the court holding that the evidence showed that the purchase of stock was made by the individual stockholders purporting to buy the same, and not by the company, and also overruling the master's finding as to the consent of the sellers of that stock that the company's money might be used in the payment of \$15,200 on said purchase, and rendered a decree requiring the stockholders named to pay back into the treasury of the company the \$15,200 according to the pro rata amount due for the shares of stock they received, and further providing

that the treasurer report to the court, within thirty days thereafter, the amount received from those parties, and ordering that W. C. Green, Frank A. Smith, and other officers named, pay to the treasurer any deficit which might appear from his report, in the full repayment of said money—that is to say, \$15-200. It finds that the complainant is the owner of certain shares of stock in said company. From that decree William C. Green alone appeals.

The vital question in the case is admitted by all parties to be, whether or not the complainant consented to the appropriation of the insurance money to the cash payment made him. Other matters, however, are alluded to by appellant as grounds of reversal, though they are not pressed with much earnestness.

It is well settled in this state, that where the officers of a corporation wrongfully deal with its property, to the injury of stockholders, the latter may maintain a bill against the company and its officers for relief against such misappropriation. The general rule is, that before ⁴⁹⁴ bringing such a bill, a demand must be made upon the proper officers of the corporation to bring the action, but, where there is a reasonable certainty that such a demand would be unavailing, it need not be made, and it is both alleged in the bill and admitted in the answer that a demand in this case would not have been regarded. It is true, in this case complainant was only a stockholder by reason of his holding the 750 shares of stock as collateral security; but if, as alleged, that security was impaired by a misappropriation of the corporate funds, we see no reason, and none is even attempted to be shown, why he might not, as any other stockholder, maintain the bill. *Baldwin v. Canfield*, 26 Minn. 43, is in point. The claim set up in the answer, that the purchase of stock was by the company, is refuted by the transaction itself, it appearing to be a purchase and sale by stockholders of the company, and not by the company. It also appears that by the subsequent transactions of the corporation such individuals were treated as purchasers of this stock, and required to pay into the treasury of the company each his pro rata share of the \$15,200. We think the circuit court was clearly justifiable in finding that this was not a purchase of stock by the corporation.

The more difficult question of fact in the case is, as before stated, whether or not the complainant and those for whom he acted knew that the cash payment was to be made with the insurance money due the company, and consented thereto. We have carefully examined the testimony relied upon by appellant

as proving such consent, and find it largely, if not altogether, of a negative character. That is to say, appellant relies upon proof of the fact that complainant was silent when appellant and other parties stated positively that the insurance money should be used in making the cash payment, and it is said these statements were repeatedly made in his presence and no objection whatever urged by him. No witness testifies that complainant ever expressly consented ⁴⁹⁵ to such use of the company's funds. It is in evidence that his son in law, Prindle, reported to one or more of the officers that he would not so consent, because such use of the funds of the company would destroy the value of the stock, and it is said that, to meet that objection, the additional 214 shares were put up. But here again no one testifies that with this additional security complainant was satisfied or withdrew the objection which he had already made. The testimony of himself, his son, and son in law is direct and positive to the fact that they neither of them ever consented to the use of the company funds in payment for their shares of stock sold. We are satisfied that the circuit and appellate court have properly found in favor of the complainant on this issue, and, without extending this opinion in the discussion of the question as to the injurious results upon the complainant's security, we think, in view of the admissions made in the answer, appellant has no ground of complaint of the decree against him.

After the master had made his report to the court and the exceptions to it were sustained, this entry was made: "It appearing to the court that the complainant, John W. Hedenberg, and the defendants Pope and Clifford and A. Emma Smith have adjusted their differences out of court, now, on motion of complainant, and by consent of said defendants, this bill is dismissed as to said Eugene Clifford, A. Emma Smith, and William H. Pope, without costs to either party." It is insisted that, after the entering of this order, the relief granted against defendants could not properly be entered. We do not concur in this view. The relief sought against the parties dismissed from the bill was not the basis of, or so connected with, that prayed against appellant as that they continued to be necessary parties to the final decree against him. In addition to this, no objection was made by appellant, or either of the other officers and directors of the company, to the dismissal.

⁴⁹⁶ We regard this case, under the pleadings, as one of fact, so largely depending upon whether the \$15,200 of company money was taken from its treasury, and applied to the payment

of a debt owing by its individual stockholders, without the consent of complainant, that when that question is determined adversely to appellant, other grounds of reversal urged are of no substantial merit.

The judgment of the appellate court will be affirmed.

CORPORATIONS—STOCKHOLDER'S SUIT.—A stockholder can appeal to a court of equity to prevent the directors, or a majority of the stockholders, from doing some act which is ultra vires, or from making some fraudulent disposition of the corporate property, or for redress where some such wrong has been done: Note to Chicago etc. Cab Co. v. Yerkes, 33 Am. St. Rep. 325, where the cases are collected. See, also, the extended note to Hersey v. Veazie, 41 Am. Dec. 867.

HOLDOM v. ANCIENT ORDER OF UNITED WORKMEN.

[159 ILLINOIS, 612.]

INSURANCE, LIFE.—THE KILLING OF THE ASSURED BY AN INSANE BENEFICIARY, under such circumstances as would make the killing murder if the beneficiary were sane, does not forfeit the latter's right to recover the insurance money.

AN INSANE PERSON IS LIABLE for his torts, but, not being capable of forming a malicious intention, is not answerable in vindicatory damages.

Case, Hogan & Case, for the appellant.

James McCartney, for the appellee.

621 **PHILLIPS, J.** The only question of law presented in this record is, Does an insane beneficiary in a life insurance policy, who kills the insured under such circumstances as would cause the killing to be murder if the beneficiary were sane, thereby forfeit his right to recover the insurance money? This presents a question of first impression.

622 The causing the death of an assured by felonious means, by a sane assignee of a policy of life insurance, has been held sufficient to defeat a recovery on the policy: New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591; Prince of Wales Ins. Co. v. Palmer, 25 Beav. 605. The general doctrine is, that insane persons are liable for damages caused by their torts, though they are free from criminal liability. In Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349, it was held that the insanity of a bailee did not relieve him from liability for destroying property held by him as bailee. In Cross v. Kent, 32 Md. 581, a lunatic was held liable in damages for burning a barn, whether occurring through negligence or as an insane act. In Taggard

v. Innes, 12 U. C. C. P. 77, it was held that insanity constituted no defense to an action for damages in trespass vi et armis. In Williams v. Hays, 143 N. Y. 442, 42 Am. St. Rep. 743, it was held that insanity of one who is the owner pro hac vice of a vessel did not relieve him from liability to other owners for negligence in her management. In this latter case, many authorities are collected and considered, and the question is treated exhaustively. In McIntyre v. Sholty, 121 Ill. 660, 2 Am. St. Rep. 140, it was held that insanity did not avail as a defense to a civil action for damages resulting from killing a person under circumstances that would have constituted a felony had the person who did the killing been sane at the time.

Such is the current of authority as to the liability of an insane person for his torts. By the great weight of authority, it is held in such cases that the lunatic, not having the element of intention or malice, is only liable for damages that would be compensatory, and not liable for vindictory damages. And such is the rule in this state: McIntyre v. Sholty, 121 Ill. 660; 2 Am. St. Rep. 140. The reason for the rule that an insane man shall be held liable for his torts is, where a loss must fall upon one of two persons equally innocent, it must be borne by the one who caused it. The liability is in no way dependent upon the intent or design to commit the act, for a lunatic can have no will, and can ⁶²³ form no design or intent, and would not be liable for a tort, wherein the intent is a necessary ingredient. Such is the rule with reference to torts. A very different question is, however, presented with reference to a contract of insurance and the liability of a company on its policy. In the absence of an express stipulation relieving the company from liability in such case, where there is no fraud or design, a fire insurance company is not relieved from liability on its policy by reason of loss by fire through the negligence of the assured or his servants: Shaw v. Robberds, 6 Ad. & E. 75; Walker v. Martland, 5 Barn. & Adol. 171; Busk v. Royal Ex., 2 Barn. & Adol. 73; Waters v. Merchants' etc. Ins. Co., 11 Pet. 213; Dobson v. Sotheby, 1 Moody & M. 90; Columbia Ins. Co. v. Lawrence, 10 Pet. 507; Catlin v. Springfield etc. Ins. Co., 1 Sum. 434; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713; 41 Am. Dec. 661; Gates v. Madison Ins. Co., 5 N. Y. 469; 55 Am. Dec. 360; Nelson v. Suffolk Ins. Co., 8 Cush. 477; 54 Am. Dec. 770; Mathews v. Howard Ins. Co., 11 N. Y. 14; Mickey v. Burlington Ins. Co., 35 Iowa, 174; 14 Am. Rep. 494; Huckins v. People's etc. Ins. Co., 31 N. H. 247; Johnson v. Berkshire etc. Ins. Co., 4 Allen, 388; Cumberland

etc. Co. v. Douglas, 58 Pa. St. 423; Gove v. Farmers' etc. Ins. Co., 48 N. H. 41; 97 Am. Dec. 572; 2 Am. Rep. 168; National Ins. Co. v. Webster, 83 Ill. 470.

If a loss is incurred by a peril insured against, the liability exists, even though the remote cause be the negligence of the assured or his servants, unless that negligence be so gross as to authorize the presumption of fraud. In *Karow v. Continental Ins. Co. of New York*, 57 Wis. 56, 46 Am. Rep. 17, in a clearly reasoned and well-considered opinion, it is held that where there is nothing in the policy to the contrary, an insurer is not released from liability because the property was burned by the assured while insane. The reason for such rule is, that an insurance company, for a consideration paid, has assumed the risk of the property being destroyed by fire. That assumption of risk includes injuries to the property by fire resulting from the negligence of the assured or his servants, where not expressly excepted. It also is an assumption of all risk of the assured becoming a lunatic, or insane, and destroying ⁶²⁴ the insured property when in that condition, unless, by the terms of the policy, such liability is saved by an express exception. An insane person may be liable for burning the property of another, for the reason that, where a loss must be borne by one of two innocent persons, it must fall on the one occasioning that loss; yet the burning of his own insured property does not necessarily injure the insurance company, if that company, for a sufficient valuable consideration, assumes the risk. That assumption of risk is the contract of the company, for a consideration paid to it. On no consideration of policy or justice should it be relieved from its contract in the absence of fraud, negligence, or design. These qualities cannot exist in the mind of an insane person. To hold that the insurance company should be relieved from liability under such circumstances would be to change the contract of the parties at the instance of one for its benefit, to the prejudice of the other without his consent, and where there is no misrepresentation, mistake, or fraud, covin, design, or malice. Such is not the law. A fire policy covers all losses or damage by fire, except such as are excepted by the terms of the policy, and such as are caused by the intended, voluntary act, design, assent, or procurement of the assured.

It has been held by repeated adjudications in various courts of this country and in Great Britain, that where there is no express provision in a life policy that in the event of the insured dying by his own hand the policy shall become void, the right

to recover thereon is not forfeited, and the policy is not vacated by reason of the suicide of the assured while in a state of temporary insanity. The proposition is so fully established and recognized that a citation of authorities to sustain it would be supererogation. Here, again, the reason for the rule is like that in case of fire insurance policies. The contract of the parties is to be construed as it has been made, and not to be changed at the request of one of the parties to ⁶²⁵ it for that party's benefit without the consent of the other, where there has been no fraud, mistake, misrepresentation, deceit, or other intentional wrong to induce the making thereof, or to accelerate the time of payment. These rules do no violence to what has been termed a maxim of the insurance law of all nations—i. e., that the assured cannot recover for loss produced by his own wrongful act (*Thompson v. Hopper*, 6 El. & B. 191), by which is meant an act intentionally wrongful.

In a case before the supreme court of North Carolina in 1888, it appeared the complainant instituted proceedings for the assignment of dower in the estate of her husband, for whose death she had been convicted as an accessory before the fact and sentenced to imprisonment for life. The trial court ruled against the allowance of dower, and, on appeal, it was said: "We are unable to find any sufficient legal ground for denying to the petitioner the relief which she demands, and it belongs to the lawmaking power alone to prescribe additional grounds of forfeiture of the right which the law itself gives to a surviving wife. Forfeitures of property for crime are unknown to our law, nor does it intercept, for such cause, the transmission of an intestate's property to heirs and distributees, nor can we recognize any such operating principle. We have searched in vain for an authority or ruling on the question, and find no adjudged case. The fact that none such is met with affords a strong presumption against the proposition": *Owens v. Owens*, 100 N. C. 240.

In the recent case, in the supreme court of Nebraska, of *Shellenberger v. Ransom*, 41 Neb. 631, it appears A died owning an estate, and left surviving her husband, a son, and daughter. The husband became tenant by the curtesy, and the children took an estate in fee. Under the statute of that state, on the death of a child the father inherits. The father murdered the daughter to obtain that inheritance. He conveyed the lands, and the vendees ⁶²⁶ filed a bill for partition against the son, who set up the fact of the daughter having been murdered by the father, of which the vendees had notice, and prayed the court to find the

father took no estate, etc. It was said: "Knowledge of the settled maxims and principles of statutory interpretation is imputed to the legislature. To the end that there may be certainty and uniformity in legal administration, it must be assumed that statutes are enacted with a view to their interpretation according to such maxims and principles. When they are regarded, the legislative intent is ascertained. When they are ignored, interpretation becomes legislation in disguise. The well-considered cases warrant the pertinent conclusion, that when the legislature, not transcending the limits of its power, speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent." The court held the father became vested with the estate of the daughter.

The line between legislation and interpretation is clear, and for the courts to declare a forfeiture for crime where the legislature has remained silent is legislation by judicial tribunals—a subject with which they have no concern. No question of public policy is presented by this record. There can be no public policy in the punishment of such persons.

This discussion brings us back to the first proposition with which this opinion commenced, and we hold, where an insane beneficiary in a life policy kills the assured under such circumstances as would cause the killing to be murder if the beneficiary were sane, such killing does not cause a forfeiture of the policy, nor bar his right of recovery for the insurance money.

The judgment of the appellate court is reversed, and that of the circuit court of Cook county is affirmed.

MURDERED BY HEIR.—A person cannot take by inheritance the estate of a person whom he murders for the purpose of removing the life that stands between him and such estate: *Shellenberger v. Ransom*, 31 Neb. 61; 28 Am. St. Rep. 500, and note.

INSANE PERSONS—LIABILITY OF FOR TORTS.—An insane person is just as responsible for his torts as a sane person: *Williams v. Hays*, 143 N. Y. 442; 42 Am. St. Rep. 743. A lunatic is liable in a civil action for any tort he may commit: *McIntyre v. Sholty*, 121 Ill. 660; 2 Am. St. Rep. 140, and note.

INSANE PERSONS—DAMAGES AGAINST.—The proper measure of damages in an action against a lunatic for a tort committed by him is mere compensation for the injury sustained. It cannot include punitive damages: *McIntyre v. Sholty*, 121 Ill. 660; 2 Am. St. Rep. 140.

SHULTS v. SHULTS.

[159 ILLINOIS, 654.]

DEEDS, DELIVERY OF, WHAT IS.—If a grantor, by his acts of delivery, loses all control over an instrument by which a grantee is to become possessed of an estate, then there is a sufficient delivery. The question is to be determined largely by the intention of the grantor, which may be ascertained by his acts and declarations, and by the circumstances attending the execution of the deed and its delivery to a third party.

VOLUNTARY SETTLEMENTS, DELIVERY.—There are stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements than of conveyances of bargain and sale.

DELIVERY.—**VOLUNTARY SETTLEMENTS** are binding on the grantor if properly made, unless there is clear and decisive proof that he never parted with, or intended to part with, the possession of the deed, and, even if he retained it, the weight of authority is in favor of its validity, unless there are other circumstances to show that it was not intended to be absolute.

CHANCERY PRACTICE—WEIGHT OF EVIDENCE.—If the testimony is oral, and is heard by the chancellor in open court, the appellate court will not reverse his findings of fact, unless he has palpably erred.

DELIVERY.—**IF THE GRANTOR LEAVES HIS DEED IN THE POSSESSION OF A THIRD PERSON**, and there is no testimony as to the directions given to him, and the deed is afterward taken away by the grantor and destroyed, and he at all times retained possession of the premises, selling part and exercising rights of ownership over the whole, a final and operative delivery of the deed will not be presumed.

A CLOUD UPON THE TITLE is a semblance of title, either legal or equitable, or a claim of a right in lands, appearing in some legal form, but which is, in fact, invalid, or which it would be inequitable to enforce.

A BILL IN EQUITY CLAIMING TITLE TO LANDS, dismissed without a hearing upon the merits, may constitute a cloud upon the title to such lands, on account of which the owner is entitled to maintain a subsequent suit in equity to remove such cloud.

Charles Wheaton, for the appellant.

Graham H. Harris, for the appellee.

660 **PHILLIPS, J.** The most important question arising on this record is, whether the deeds to the property in question were, after their execution, delivered by the grantor to a third person in escrow, to be by him delivered to the grantees after the death of the grantor.

If the grantor, after his act of delivery, loses all control over instrument, and by it the grantee is to become possessed of the estate, then there is a sufficient delivery: *Bryan v. Wash*, 2 Gilm. 557; *Cline v. Jones*, 111 Ill. 563. The question is to be determined largely by the intention of the grantor, which may be ascertained by his acts and declarations, and by the circumstances attending the execution of the deed, and its delivery to a

third party: *Masterson v. Cheek*, 23 Ill. 72; *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445. In *Byers v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212, it is said: "The question as to what acts are necessary to constitute a sufficient delivery to render a deed operative and to pass the title to the land has been the subject of much discussion in this court. . . . It may be delivered to the grantee or to his agent. Nor is any particular form or ⁶⁶¹ ceremony necessary to constitute a sufficient delivery. It may be by acts or words, or both, or by one without the other; but what is said or done must clearly manifest the intention of the grantor and of the grantee that the deed shall at once become operative to pass the title to the land conveyed, and that the grantor loses all control over it."

The question of delivery is one both of law and of fact. From the detail of such facts and attending circumstances is to be determined the legal question as to whether such acts and declarations constitute a legal delivery. It is said, in a case like this, the law makes stronger presumptions in favor of the delivery of the deed than in an ordinary case of bargain and sale, for the reason that it was attempt on the part of the grantor to make a voluntary settlement. That there are stronger presumptions in such cases has frequently been recognized by this court: *Bryan v. Wash*, 2 Gilm. 557; *Reed v. Douthit*, 62 Ill. 348; *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445; *Cline v. Jones*, 111 Ill. 563. Such settlements, fairly made, are binding on the grantor, unless there be clear and decisive proof that he never parted, or intended to part, with the possession of the deed; and even if he retained it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances, besides the mere fact of his retaining, to show that it was not intended to be absolute: *Souverbye v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Scrugham v. Wood*, 15 Wend. 545; 30 Am. Dec. 75; *Otis v. Beckwith*, 49 Ill. 121; *Gline v. Jones*, 111 Ill. 563; *Perry on Trusts*, sec. 103.

It follows, therefore, as heretofore stated, that the intention of the grantor is the controlling element. There are some disputed questions of fact in the record. The testimony was, in a large degree, oral and heard by the chancellor in open court, and, as we have frequently said, where such is the case we will not disturb the decree of the trial court, in so far as it determines questions of fact, unless there is in the finding of the trial court palpable ⁶⁶² error: *Baker v. Rockabrand*, 118 Ill. 365; *Johnson v. Johnson*, 125 Ill. 510; *Coari v. Olsen*, 91 Ill. 273; *Towle v. Wadsworth*, 147 Ill. 80.

In the absence of the testimony of the custodian who had possession of these deeds for a time, it is largely a matter of presumption as to what directions were given at the time the deeds were deposited by the grantor, or under what conditions or instructions they were placed with Dewey, the custodian. Considering all the attending circumstances, and the fact that they were afterward taken away by Shults, the grantor, and subsequently destroyed by him, it was not error for the trial court to reach the conclusion it did, that there was no intention on the part of the grantor to lose control of the deeds, or that they should become operative and effective so as to pass title. On the contrary, it is apparent that the deeds were left for a time with Dewey because of the convenience for safe-keeping. The facts that the grantor during this time continued to exercise acts of ownership and authority over the premises, and that during this time he also sold a portion thereof, and proposed to sell the remainder, are inconsistent with the theory of an international delivery, operative and effectual to pass title to appellant.

In the case of *Stinson v. Anderson*, 96 Ill. 373, the grantor, prior to his second marriage, executed a deed to the children of his former marriage for certain lands, and left it with a magistrate before whom it was acknowledged, to be delivered to them after his death. At the time it was left, he said to the magistrate: "I want you to take it and take care of this deed for me. If I want it, I will call and get it. If I die, or anything serious should happen to me, I want you to deliver it to my children, if of age. If they are not of age, then to deliver it to their guardian, for I want my three children to have the benefit of their mother's labor." Afterwards the grantor mortgaged the land to secure borrowed money. After his death, the question ~~arose~~ arose whether there was a sufficient delivery of the deed to the magistrate to pass title to the three children. The court held in that case there was no sufficient legal delivery of the deed, for the reason a future control was retained over it by the grantor, and these subsequent acts indicated that the delivery to the magistrate was not absolute, and the deed should not pass entirely beyond his control.

As we have said, it is not apparent from this record what were the conditions under which the deeds were deposited by the grantor with Dewey, the custodian. After the deeds were executed before the notary public, it appears it was some short time before they were left with Dewey, the custodian, and the grantor might easily have changed his mind, after his conversation with

the notary, as to the conditions upon which he intended to deposit the deeds with the custodian.

It is apparent from the examination of this record that it was proper for the circuit court to find there was no sufficient delivery of the deeds to pass title of the lots in question to appellant, and to deny him relief on his cross-bill and enter the decree dismissing it. It is said that, even though this be true, the original bill filed by appellant does not entitle her to relief. The purpose of the original bill is to set aside a cloud upon her title. In *Rigdon v. Shirk*, 127 Ill. 411, it is said: "A cloud is said to be the semblance of a title, either legal or equitable, or a claim of an interest in lands, appearing in some legal form, but which is, in fact, unfounded, or which it may be inequitable to enforce. If the claim sought to be removed is valid, and may be enforced either at law or in equity, it cannot be said to be a cloud." In the former bill filed, in which appellant claimed title to these lots, and which was dismissed without a hearing on its merits, the allegations therein tended to depreciate the title of appellee, or to interfere with the sale of the property, by reason of such proceedings appearing upon ⁶⁸⁴ abstracts of title thereto, and it was a proper subject of inquiry by a court of equity as to whether such proceedings were a cloud on her title. This former bill was a declaration of title in appellant, and remained on file in the clerk's office of Cook county, notice to all the world that appellant claimed to have some title in these premises. It was a semblance of title, but, as we have found in this proceeding, it could not be enforced either in law or in equity, and therefore it was a cloud upon appellee's title, and it was proper for the circuit court to enter the decree granting the relief asked in the original bill.

We find no error in the decree of the circuit court, and it is accordingly affirmed.

DEEDS—DELIVERY TO THIRD PERSON—INTENTION.—To constitute the delivery of a deed, it must appear that it was the intention of the grantor that the deed should pass title at the time, and that he should lose control of it: *Wilson v. Wilson*, 158 Ill. 567; 49 Am. St. Rep. 176, and note. The delivery of a deed to a stranger, to be delivered to the grantee at the direction of the grantor, or with a reservation of a right in him to countermand it, does not pass the title, nor raise a presumption that delivery is made with that intention. To pass the title, the facts and circumstances attending the transaction must be such as to show that the grantor intended that the deeds should be delivered by the custodian to the grantee: *Trask v. Trask*, 90 Iowa, 318; 48 Am. St. Rep. 446, and note.

CLOUD ON TITLE—WHAT CONSTITUTES.—A cloud upon title is a title or encumbrance apparently valid, but in fact invalid: Extended note to *Holden v. Holden*, 45 Am. St. Rep. 373.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

PICKRELL v. JERAULD.

[1 INDIANA APPEALS, 10.]

EXEMPTION LAWS MUST BE LIBERALLY CONSTRUED
in favor of the debtor.

EXEMPTIONS — PARTIES — SETOFF.—In an action by an assignee of a note, the assignor is a proper party plaintiff for the purpose of claiming the proceeds of the note as exempt from a judgment held by the defendant against the assignor, and pleaded as a setoff against the note.

A NOTE EXEMPT from a judgment upon which execution has issued is not made subject thereto by an assignment of the note before any claim for exemption is made.

EXEMPTION AGAINST JUDGMENT — EVIDENCE.—If a claim for statutory exemption is set up against a judgment clearly shown by the record to have been rendered in an action founded on contract, evidence is not admissible to show that such judgment was rendered in an action founded on tort, for the purpose of defeating the claim for the exemption.

L. C. Embree, for the appellants.

J. H. Miller, for the appellees.

10 ROBINSON, J. The appellee, Martha R. Jerauld, the plaintiff in the court below, sued the appellants on a note made payable to Sylvester B. Jerauld, her husband, which was by him assigned to her. The appellants answered, in four paragraphs: 1. General denial; 2. Payment; 3. That the note was executed without consideration; 4. Setoff, which was a judgment rendered by the Gibson circuit court, on the twenty-first day of February, 1887, against Sylvester B. Jerauld, the payee of said note, and in favor of Martin V. Witherspoon and others, in the sum of two hundred and sixty-eight dollars and seventy-three cents, which judgment was properly assigned to the appellant Pickrell before this suit commenced, and before said Jerauld assigned the note in suit to

¹¹ his wife, Martha R. Jerauld, appellee; that the other appellant, William D. Daniels, was only surety. The appellee Martha R. Jerauld demurred to the fourth paragraph of the answer, which demurrer was overruled.

Thereupon Sylvester B. Jerauld filed his petition, which was sworn to, asking to be made a party plaintiff in this action, which petition stated and set forth, among other things, that he was the same Sylvester B. Jerauld against whom the judgment mentioned in the fourth paragraph of the answer was rendered in favor of Martin V. Witherspoon, and others; that said judgment was rendered for a debt growing out of and founded upon a contract between said judgment defendant and plaintiffs during the years 1882 and 1883, in the state of Indiana, and not prior thereto; that the petitioner was a resident and householder of the state of Indiana, and had been such resident householder since January 1, 1872, and as such resident householder had been at all times since the rendition of said judgment entitled to have six hundred dollars' worth of his property exempt from execution; that at the time he assigned said note he owned less than six hundred dollars' worth of property rights, credits, and choses in action, including the note sued on in this action, and the court, over a motion to reject said petition, granted the prayer thereof, and ordered said petitioner to be made a party plaintiff to said action, and the appellees filed a reply in two paragraphs, to the second, third and fourth paragraphs of the answer: 1. General denial; 2. That on the twenty-first day of February, 1887, by the consideration of the Gibson circuit court, of Gibson county, Indiana, said Martin V. Witherspoon and others were plaintiffs, and Sylvester B. Jerauld was defendant, the plaintiffs in said action obtained a personal judgment against said defendant for two hundred and sixty-eight dollars and seventy-three cents, and costs of suit; that said judgment was rendered for and upon a debt growing out of and founded upon a contract between said judgment plaintiff and defendant for divers lots of flour, meal, bran, screenings, and other merchandise ¹² sold and delivered by the judgment plaintiffs to the judgment defendant during the years 1882, 1883, and prior thereto, that said goods and merchandise were both sold and delivered in the state of Indiana, and that said judgment was rendered upon and for no other cause of action; that said Sylvester B. Jerauld is a resident householder of the state of Indiana, and has been such resident householder of the state of Indiana since the first day of January, 1872, and as such has been entitled, at all times since the rendition of said judgment,

to have six hundred dollars' worth of his property exempt from sale on execution; that upon ——— day of May, 1887, the date upon which the note in suit was assigned to the plaintiff, he had and owned the following property, and here sets out a list and the value of such property owned by him on that date, amounting to four hundred and thirty-three dollars and seventy-five cents, which includes the note in suit, and that the described property was all the property, real and personal, owned by him, or in which he had any interest in the time he assigned said note; and that he has not, at any time since the rendition of said judgment, owned as much as six hundred dollars' worth of property, including both personal and real; that the inventory and schedule of the property contain a full and true account of the property of said Sylvester B. Jerauld within and without the state of Indiana, as well as of the rights, credits, effects, choses in action, and of all other personal property, of every kind and description whatever, belonging to him, or in which he had any interest whatever at the time the note in suit was assigned, and the valuation fixed upon said property in said schedule was a fair and reasonable valuation, and they filed an inventory and schedule of the property of said Sylvester B. Jerauld, owned by him at the time the note in suit was assigned, and made the same a part of said reply, marked "Exhibit A."

The reply then shows the selection of a competent appraiser of the neighborhood of said Sylvester B. Jerauld to appraise said property, and asks that defendant be required ¹² to select another like competent appraiser, and, on his failure to make said selection, that the court select such appraiser to make said appraisement, and that the note in suit be set off to plaintiff herein as a part of the six hundred dollars to which the said Sylvester B. Jerauld was entitled under the laws and constitution of Indiana, and that said judgment and no part thereof be allowed as a setoff against the note sued upon, and that said judgment be held void and of no effect whatever against the note in suit. The appellants filed a demurrer to the reply, which was overruled and excepted to.

The case was submitted to the court for trial, and both parties requested the court to make a special finding of facts and state his conclusions of law thereon. Upon the special finding of facts and his conclusions of law thereon, the court found for the appellee Martha R. Jerauld, and upon the facts so found the court found the following conclusions of law: That the note sued on was not liable to be sold on execution of the judgment assigned to the appellant Pickrell, and the proceeds thereof could

not have been reached by proceedings supplementary to execution; that the judgment cannot be set off against the note in suit in appellee Martha R. Jerauld's hands, and that the appellee Martha R. Jerauld was entitled to judgment against the appellants for the amount of the note, interest, costs, etc.

The appellants filed a motion for a new trial, which was overruled and excepted to, and judgment was rendered in favor of appellee Martha R. Jerauld on the special finding of facts and conclusions of law.

It is not deemed necessary to set out in this opinion, in detail, the special findings; they are lengthy, but cover all the questions in the case and find the view of the case in favor of the appellee as presented by the pleadings. The evidence is in the record.

The appellant limits his argument for a reversal of this ¹⁴ cause to the following questions, all of which are properly before this court: That the court erred in overruling the demurrer to the second paragraph of the reply; that the court erred in not carrying the demurrer to the second paragraph of the reply back to the complaint, and not sustaining it to the complaint; that the court erred in overruling the motion to strike out the petition of Sylvester B. Jerauld; that the court erred in admitting Sylvester B. Jerauld as a party plaintiff.

If there was no error in admitting Sylvester B. Jerauld as a party plaintiff on his own petition, and in overruling the demurrer to the second paragraph of the reply, then this fact disposes of these several questions. That these questions may be clearly presented and understood we have set out in the statement of the case, substantially, the petition and reply. The inquiry becomes pertinent to know whether the petition of Sylvester B. Jerauld shows that he had such an interest in the case as to permit him to be made a party plaintiff, and the facts stated in the second paragraph of the reply were sufficient to defeat the setoff to the complaint contained in the fourth paragraph of appellant's answer; to be more accurate and concise, could Sylvester B. Jerauld, by being made a party plaintiff to this action, defeat the judgment pleaded as a setoff in the fourth paragraph, on the ground that, being a resident householder and not the owner of six hundred dollars' worth of property, including the note, at the time it was assigned, was entitled to and could claim the benefits of the exemption law? Section 272 of the Revised Statutes of 1881 provides that: "The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot

be had without the presence of other parties the court must cause them to be joined as proper parties. And when, in an action for the ¹⁵ recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes an application to the court to be made a party, it may order him to be made a party by the proper amendment."

It is true that Sylvester B. Jerauld had parted with his interest in the note sued on by assignment to his coplaintiff; he did not own or claim to own it. Still he had a right and interest with her in joining with her in the suit to have the note exempted from the judgment, which he could have had done from an execution on the judgment had he not assigned it. The said Sylvester B. Jerauld having been admitted as a party plaintiff, the next inquiry is, Was the second paragraph of the reply of the appellees, which was joint, to the fourth paragraph of the appellants' answer, sufficient? It does not appear that an execution had been at any time issued on the judgment sought to be set off against the note sued on, so as to give the debtor an opportunity to claim the benefit of the exemption laws, but that a few days before the assignment of the note the appellants procured an assignment of the judgment.

It will not be doubted that the appellee Sylvester B. Jerauld, under the facts, has a clear right to an exemption of six hundred dollars' worth of property on the judgment, and had he retained ownership of the note, as without it his property did not exceed six hundred dollars in value, that he could have included the note in his property exempt, and thereby made his title to the note clear and unencumbered from the judgment or from proceedings supplementary to execution. This being true, can it be claimed that by the assignment of the note the right to exemption was defeated? Such was not certainly the purpose and intention of the exemption law; to permit this to be done would be to take from the debtor property which the constitution and statute declare shall be held by him for the benefit of his family. It has frequently been held by the supreme court that the provisions of the statute ¹⁶ for exemption of property must be liberally construed in favor of the debtor.

To give effect to the evident purpose of the law, to provide against a debtor's family being stripped of a reasonable measure of support, the courts have, with little diversity of opinion, held that one judgment cannot be set off against another, where the debtor makes due and lawful claim to exempt his interest in the judgment held by him. It is also held that a setoff of one judgment against another will not be allowed, unless it is equit-

able to allow it; that the great purpose of the law is to protect the debtor's family, and to effect this purpose the law must be liberally construed: *Junker v. Hustes*, 113 Ind. 524. It is also held in the case of *Barnard v. Brown*, 112 Ind. 53, that where one who has the right to the benefit of the exemption law owns property, real and personal, the aggregate value of which is less than six hundred dollars, and sells the real estate, there being at the time judgments against him, which are liens on such real estate, he and his grantee may maintain a joint action to have the latter's title to such real estate quieted and freed from apparent lien and encumbrance from such judgments, and the property owned at the time of such conveyance set off to him as exempt from such execution. We are unable to see any difference in principle to be distinguished between this case and those cited. The fact that the note was assigned, that execution had not issued on the judgment, and an actual claim for exemption was not made until after this was commenced, and then made in the form it was, could not divest the right to exemption, and presents as strong reasons why the principle should be applied in this case as in any of the many cases which have been determined by the supreme court. The conclusion thus arrived at is but carrying out the intent and purpose of the exemption law. There was no error committed in overruling the demurrer to the second paragraph of the reply. Having arrived at these conclusions, the alleged ¹⁷ error of the court in overruling the second paragraph of the reply; in not carrying the demurrer to the second paragraph of the reply back to the complaint, and in not sustaining it to the complaint; in overruling the motion to strike out the petition of Sylvester B. Jerauld, and in admitting Sylvester B. Jerauld a party plaintiff in this action, are disposed of.

The views we have expressed upon the ruling of the court upon the second paragraph of the reply to the fourth paragraph of the answer sustain the conclusion of law of the trial court upon the special finding of facts.

The evidence is in the record and does not only tend to sustain the court in its finding, but the evidence does sustain its finding, and, therefore, the cause assigned in the motion for a new trial, that the decision of the court was not sustained by sufficient evidence, is not well taken.

The remaining alleged errors discussed by the appellants are errors of the trial court in excluding the testimony of Martin V. Witherspoon, offered by the appellants, and in refusing to permit the witness Witherspoon to answer certain questions asked by the appellants.

Martin V. Witherspoon, a witness introduced on behalf of the appellants, was asked as follows: "State the facts out of which your claim against Sylvester B. Jerauld arose," to which question the appellees objected, and the objection was sustained; whereupon the appellant stated that he expected to prove by said witness, in answer to said question, that during the years 1882 and 1883, said firm of Witherspoon, Barr & Co., while engaged at Princeton, Indiana, in the general grain and milling business, and for the purpose of carrying on the same, employed the plaintiff Sylvester B. Jerauld to act for them as their agent at the town of Patoka, Indiana, in handling and selling for them of the products of their mill, and said Sylvester B. Jerauld acted as such agent ¹⁸ during the years aforesaid, and while so engaged said Sylvester B. Jerauld received into his hands for sale, as such agent, large quantities of flour, meal, bran, screenings, and other merchandise from said firm, and undertook and agreed to sell the same for them as their agent, and fully to account for and pay over to said firm the proceeds of said sales, and that said Sylvester B. Jerauld, while acting as such agent, sold said flour, meal, bran, screenings, and other merchandise, and kept and converted to his own use a large part of the proceeds, in the sum of two hundred and sixty-eight dollars and seventy-three cents, and wholly failed and refused to account for and pay over the same to said firm or to any other person, although said firm had often, prior to the bringing of this suit by them against said Jerauld, demanded of him such accounting and payment; that these are the facts and circumstances upon which the suit of said firm against said Sylvester B. Jerauld, which terminated in the judgment before mentioned, was founded and out of which it arose, although in form the suit was an ordinary open account for flour, meal, bran, screenings and other merchandise.

The court sustained said objection and refused to permit said witness to answer said question. The appellants then propounded to said witness the following question, to wit: "Tell the court what business transaction, if any, the firm of Witherspoon, Barr & Co. had with the plaintiff Sylvester B. Jerauld prior to the time of the taking of said judgment against him," to which question the appellees objected, which objection was sustained; whereupon the appellant stated to the court that they expected to prove by said witness, in answer to said question, that said firm had never had any business transactions with said Sylvester B. Jerauld, except the one just detailed to the court by the defendant, and above set out in this his bill of exceptions. The court sustained said objection, and declined to permit said witness to answer said question.

¹⁹ And thereupon said appellants propounded to said witness the following question, to wit: "What were the facts out of which the liability of Sylvester B. Jerauld to the firm of Witherspoon, Barr & Co., upon which the judgment you have mentioned was rendered, arose? Detail them to the court." To which question the appellees objected, and the objection was sustained; whereupon the appellants stated to the court that they expected to prove by said witness, in answer to said question, that the liability of said Sylvester B. Jerauld to said firm arose out of and on account of the facts and circumstances offered to be proved by the defendants by the witness' answer to the question immediately preceding this one; which said facts the court declared himself the facts fully to know and remember, and the same are set forth as above.

It is conceded that the pleadings in the case of Witherspoon, Barr & Co., resulting in a judgment against said Sylvester B. Jerauld, which was assigned to the appellant Pickrell, and sought to be set off in this action, showed that the action was upon account, and that there was nothing contained in the pleading, or on the face of the record to the contrary, and that, in fact, it was founded upon contract. It is not claimed that there was uncertainty or ambiguity in the record, as it will be observed that the object and purpose of this evidence were to go behind the record, and show by parol testimony that the action was, in fact, in tort, and not on contract. We think the court ruled correctly in refusing to permit the appellant to introduce, on the trial, the evidence of the witness Witherspoon: *Smith v. Wood*, 83 Ind. 322; *Gentry v. Purcell*, 84 Ind. 83.

We find no error in the record for which this case should be reversed. It is, therefore, in all things affirmed, with costs.

IN THE CASE of *Coppage v. Green*, 1 Ind. App. 112, the court decided that "where an action is brought on an open account for work and labor, or for goods sold and delivered, or for money loaned, and the defendant, in his answer, pleads a setoff to the account in the form of a judgment previously obtained" by him against such plaintiff, the latter, who is a householder and would be entitled to the benefit of an exemption on execution, may, in his reply, demand that his claim, which he holds and on which he seeks to recover, shall be set off to him as exempt from sale or seizure, such a proceeding is the taking of property "on execution or other final process," within the meaning of the statute of exemptions.

EXEMPTION LAWS—CONSTRUCTION OF.—Exemption laws are to be literally construed in favor of those claiming their benefit: *Morgan v. Rountree*, 88 Iowa, 249; 45 Am. St. Rep. 234, and note; *Millington v. Laurer*, 89 Iowa, 322; 48 Am. St. Rep. 385, and note.

ASSIGNMENT OF EXEMPT CLAIM.—A debtor may lawfully assign his personal earnings within ninety days from the time the services

were rendered, even to a nonresident of the state, and the debtor's right to have them exempt from seizure for the payment of his debts passes to the assignee: *Millington v. Laurer*, 89 Iowa, 322; 48 Am. St. Rep. 385, and note.

TAYLOR v. WOOTAN.

[1 INDIANA APPEALS, 188.]

MASTER AND SERVANT—ASSUMPTION OF RISKS.—A servant is bound to know, and assumes the risk of, all defects in appliances about which he is employed that are open to observation, or can be ascertained by the ordinary exercise of the senses.

ASSUMPTION OF RISKS.—MINOR OR INEXPERIENCED SERVANTS, as well as ordinary servants, in their contract of employment assume all risks ordinarily incident to the service, and this includes all of which they have notice and all that are patent and obvious to them.

APPELLATE PRACTICE.—IF A DEMURRER to a bad paragraph of a complaint containing one or more good paragraphs is overruled, it must be presumed harmful and be held reversible error on appeal, unless it affirmatively appears by the record that the judgment rested exclusively upon the good paragraphs. If it appears from questions answered by the jury that the verdict is based solely upon the good paragraphs, the overruling of the demurrer is a harmless error.

INSTRUCTIONS TO INEXPERIENCED SERVANTS, in order to relieve the master from liability for injury to them, must be such as to enable them to comprehend the dangers of their situation, and appreciate the necessity of adopting prudent methods for their protection.

JURY TRIAL — INSTRUCTIONS — CONSTRUCTION. — It is not necessary that each instruction should contain the whole law of the case, or any branch of the case with recognized exceptions. If an instruction contains a complete statement of a proposition of law applicable to the facts in a given case, it is good as part of a series containing the entire law of the case. All of the instructions must be considered together, and construed with reference to each other.

INSTRUCTIONS ON THE NEGLIGENCE OF A MASTER, wholly ignoring the contributory negligence of the servant, are not erroneous, if such contributory negligence is fully and clearly expounded in other instructions.

INFANT EMPLOYEES.—A master may employ an infant in a hazardous occupation, on condition that he shall furnish such infant with such information relative to the perils of his situation as will enable him to comprehend such dangers, and understand how to avoid them.

MENTAL CAPACITY OF SERVANT—DUTY OF MASTER.—It is an actionable wrong for a master to expose in a hazardous employment a servant whom he knows to be lacking in capacity to understand and appreciate the dangers surrounding him, however much he may have been instructed.

MINOR SERVANTS.—TO JUSTIFY A MASTER IN THE EMPLOYMENT of an ignorant and inexperienced infant in a hazardous employment, such infant must possess at least sufficient

capacity to understand the dangers of the situation and to appreciate the importance of heeding prudent warnings for his own safety.

PRACTICE—REVISION AND REJECTION OF INTERROGATORIES.—The court may properly revise and modify interrogatories offered by the parties, to make them correspond with the facts involved, and it may reject such as, however answered, will not control the general verdict.

C. L. and H. E. Jewett, for the appellants.

J. V. and C. D. Kelso, for the appellee.

¹⁸⁹ CRUMPACKER, J. Henry Wootan, a minor, by next friend, sued Benjamin K. Taylor and Joseph E. Taylor in the Floyd circuit court to recover damages for an injury alleged to have been sustained by the plaintiff while in the employment of the Taylors in their manufactory at New Albany.

The complaint contains three paragraphs, and a separate demurrer was filed to each paragraph and overruled, to which exceptions were duly taken.

Issues were joined by general denial, and the cause was tried by a jury, and resulted in a verdict for the plaintiff below.

At the proper time appellants' counsel requested that the jury be required to answer a series of interrogatories, some of which the court refused to submit to the jury, and appellants excepted.

At the time the verdict and interrogatories were returned into court the appellants asked that the jury be required to give more specific answers to four of the interrogatories before being discharged, which request was denied, and they excepted.

¹⁹⁰ They then filed a motion for a new trial, based upon ten alleged errors which occurred at the trial, and this motion was overruled and exceptions taken; thereupon judgment was entered upon the verdict.

The errors relied upon in this court for the reversal of the judgment are: 1. Overruling the demurrer to the third paragraph of complaint; and 2. Overruling the motion for a new trial.

The first paragraph of complaint declares that the appellants were partners, engaged in manufacturing the woodwork for wagons and other vehicles in the city of New Albany, and in their manufacturing establishment they had a machine used for dressing lumber, called a "planer," which consisted of a framed stand upon which was adjusted a cylinder containing a number of very sharp knives, and which revolved rapidly when in operation; that the planer was uncovered and unguarded, and very dangerous; that the appellee was a minor, only twelve years old, and was wholly inexperienced in the use, and ignorant of the dangerous

character of, the planer, and the appellants, with knowledge of his youth, inexperience, and ignorance, employed him to work for them, and set him to carrying lumber from the planer after it had been properly dressed; that they carelessly and negligently failed to instruct him properly in relation to such work, or to caution him of the dangers incident thereto, and while he was so engaged, without any fault upon his part, his arm caught in the cylinder upon said planer and was so injured that it had to be amputated near the shoulder.

The second paragraph is substantially like the first, except it alleges that the appellee lacked the capacity to understand and appreciate the dangers incident to his employment, and was unfit to be set at such work, which the appellants knew, but carelessly and negligently so engaged him.

The third paragraph alleges the employment of the appellee to work at the planer, his youth and inexperience, and ¹⁹¹ that the appellants carelessly and negligently left the planer uncovered and unguarded, and carelessly left open and uncovered certain apertures in the floor at the rear of the planer, which were used to dispose of shavings from the lumber, whereby the appellee, without fault in himself and while in the line of duty, stepped in one of said apertures, and was thrown upon and against the revolving cylinder of the planer, and so injured that he lost his arm.

There was no averment in the third paragraph that the appellants failed to properly instruct the appellee of the hazards of his employment, or that he was unable to comprehend the dangers of the situation on account of his ignorance, inexperience, or immature judgment. The negligence complained of in this paragraph consisted in leaving the planer uncovered and unguarded, and the apertures in the floor unprotected. These defects were patent and obvious, and must have been known to the appellee at the time he engaged in the service of appellants. A servant is bound to know what is open to observation and can be ascertained by the ordinary exercise of the senses.

It is well settled, also, that a servant, in his contract of employment, by legal implication, assumes all of the risks ordinarily incident to the service, and this includes all of which he has notice—all that are patent and obvious to him. These rules of law obtain in cases of the employment of minors, and inexperienced persons, as well as others: *Pittsburgh etc. Ry. Co. v. Adams*, 105 Ind. 151; *Sullivan v. India Mfg. Co.*, 118 Mass. 396. This paragraph of complaint, for the reasons stated, cannot be up-

held, but it does not necessarily follow that the error must result in reversing the judgment.

We are convinced, by the reasons advanced by counsel for the appellee, that the error in overruling the demurrer to this paragraph resulted in no harm to the appellants. Where a demurrer is overruled to a bad paragraph of a complaint containing one or more good paragraphs, it will be presumed harmful, and be held reversible error, unless it shall affirmatively ¹⁹² appear by the record that the judgment rested exclusively upon the good paragraphs: Carr v. Hays, 110 Ind. 408.

But in this case the instructions were predicated solely upon the first and second paragraphs of complaint, and the jury answered thirty-five interrogatories, covering about every fact in issue, and from these it is clear that in reaching the general verdict they adopted the theories of liability declared upon in the first and second paragraphs exclusively, so we must hold the error harmless.

Complaint is next made of the action of the trial court in permitting a witness to testify in appellee's behalf to a conversation with one of the appellants a short time after the injury occurred, in which he promised to educate the appellee, and furnish him suitable employment when he should recover from the injury. The court, in its instructions, informed the jury that this evidence was incompetent, and should not be considered for any purpose; consequently, if any error was committed in admitting it, it was fully cured by the instructions.

The following instructions were requested by the appellants and refused:

"1. If you are satisfied from the evidence that at the time the plaintiff was employed by the defendants, they, or either of them, or one Marion Shaw for them, warned the plaintiff that the planer which injured him was dangerous, and that he must keep away from the same while it was running, and that after being so warned, the plaintiff, in violation of said warning and instructions, went so near to said planer while it was running that his arm was caught in said planer and injured, then you should find for the defendants.

"3. If you find from the evidence that before the plaintiff was put to work at the planer, the defendants told him the planer when running was dangerous, and instructed him to keep away from the same while it was running, and that afterward the plaintiff was injured by going too near the ¹⁹³ planer when in motion, then you should find for the defendants.

"5. If the plaintiff, before he was injured, had been properly warned of the dangers of his position, and instructed to keep away from said planer while the same was in motion, and afterward was injured through his own carelessness in going too near said planer when the same was in motion, you should find for the defendants."

These instructions were properly refused. The first and third do not state the law correctly as applied to the facts in this case. It was proved, without contradiction, that the appellee was but twelve years of age at the time he was injured, and that he had worked but two days and a half for the appellant, and was wholly inexperienced in the running and operation of the machinery in the manufactory, and that he was employed to work in connection with the planer. Under these circumstances, it cannot be declared, as a matter of law, that the employers absolved themselves from responsibility by simply telling the appellee of the dangerous character of the machinery and warning him to keep away from it while it was in motion. They knew his age and lack of experience, and it was their duty to have so graduated their instructions to his youth, ignorance, and inexperience as to have enabled him to fully understand and appreciate the dangers surrounding him, and to have placed him, with reference thereto, in substantially the same relation as if he had been an adult. Instructions to an inexperienced servant must be such as to enable him to comprehend the dangers of his situation and appreciate the necessity of adopting prudent methods for his protection: Wood on Master and Servant, sec. 350. The first and third instructions requested by appellants fell far short of the requirements of the law.

No particular objection can be urged against the other instruction requested and refused. It stated the law correctly ¹⁹⁴ to the extent it assumed to go, but the propositions contained in it were fairly embodied in those given, so it was not error to refuse it.

Among the instructions given by the court counsel for appellants vigorously assail the following:

"3½. Persons who employ children must anticipate the ordinary behavior of children, and must take notice of their lack of judgment, and must exercise greater care toward and for them than is required by law to be exercised toward and for adult persons.

"6. It is an actionable wrong for a person to place or employ a child of such immature judgment as to be unable to comprehend the danger to work with or about a machine of a dangerous char-

acter likely to produce injury, and in this case, if you are satisfied by a preponderance of the evidence that the defendants employed plaintiff at and about a machine of a dangerous character, and one likely to produce injury, and that he was injured while working at and about said machine, and at the time of his injury he was of such immature judgment as to be unable to comprehend the dangerous character of the said machinery, you ought to find for the plaintiff."

It is argued that these instructions wholly ignore the question of contributory negligence, and are therefore erroneous. It is not necessary that each instruction should contain the whole law of the case, or any branch of the case with the recognized exceptions. They should all be considered together, and construed with reference to each other. If an instruction contains a complete statement of a proposition of law applicable to the facts in a given case, it will be held good as part of a series containing the entire law of the case. The subject of contributory negligence was fully and clearly expounded in other instructions, so this objection is not tenable.

It is insisted further that these instructions are vicious, in that they declare it to be an actionable wrong to employ an ¹⁹⁵ infant in a dangerous position under any circumstances. They do not bear any such an interpretation, and, read in the light of the evidence and in harmony with the other instructions, they correctly state the law.

It should be kept in mind that the complaint proceeds upon two separate and distinct theories. In the first paragraph the liability of appellants is predicated upon their alleged negligence in the employment of the appellee in a hazardous undertaking, without giving him sufficient instructions to enable him to guard against the dangers, while in the second paragraph it is alleged that the appellee lacked the capacity to understand and appreciate the dangers incident to the service, and was therefore unfit for that kind of work, and the appellants were culpable for engaging him in such work, knowing his incapacity. The instructions complained of are pertinent to the latter theory.

The law recognizes the right of a master to employ an infant in a hazardous occupation, on condition that he shall furnish such infant with such information relative to the perils of his situation as will enable him to comprehend the dangers and understand how to avoid them. But it is an actionable wrong for a master to expose in a hazardous employment one whom he knows to be lacking in capacity to understand and appreciate the dangers

surrounding him, however much he may have been instructed. A contrary rule of law would be egregiously inhuman.

In the case of *Pittsburgh etc. Ry. Co. v. Adams*, 105 Ind. 151, the supreme court said upon this question: "A neglect of such duties may, in a proper case, the servant being without contributory negligence, render the master liable, regardless of the fact that he may have exercised reasonable care in making and keeping the premises, machinery, and appliances in a safe condition. The person employed may be so young, inexperienced, and immature in judgment that no kind of warning and instruction would relieve the master from responsibility ¹⁹⁶ for injuries resulting from putting him at a hazardous and dangerous work."

The rule is stated thus in *Shearman and Redfield on Negligence*, 4th ed., sec. 219: "And if he [the master] knows, or in the exercise of ordinary care and sagacity would have known, that the servant has not capacity enough to understand the warning and appreciate the danger, he will be liable for any injury which such servant may suffer in consequence, if continued at such work": See, also, *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 3 Am. Rep. 506; *Hamilton v. Galveston etc. Ry. Co.*, 54 Tex. 556; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548.

It would be extremely difficult to formulate an arbitrary rule for the measurement of capacity in such cases, but it may be safely declared that to justify a master in the employment of an ignorant and inexperienced infant in a hazardous calling, such infant should possess at least sufficient capacity to understand the dangers of the situation and to appreciate the importance of heeding prudent warnings for his own safety.

The question of the appellee's capacity in this case was properly submitted to the jury, and the instructions attacked by the appellants were not erroneous.

The trial court refused to submit to the jury four of the interrogatories requested by the appellants, and this is complained of. In so far as these interrogatories sought to elicit facts, and not conclusions of law, they were fully covered and answered in the thirty-five submitted by the court at the request of the parties.

One was modified by the court, but there was no error in this. It was proper for the court to revise and modify interrogatories offered by the parties to correspond with the facts involved, and nothing more was done in this instance: *Louisville etc. Ry. Co. v. Worley*, 107 Ind. 320.

Several interrogatories propounded to the jury inquired in ¹⁹⁷ various forms if the appellee had not been instructed, before he

was injured, relative to the dangerous character of the planer and other machinery, and if he had not been warned to keep away from such machinery while it was in motion, and the jury answered that partial instruction and warning had been given.

It is insisted that appellants had the right to more specific answers, stating to what extent the appellee had been instructed and warned. If the court erred in refusing to require more specific answers to these interrogatories, which we do not decide, the error was harmless, as no answers that could have been given responsive to the questions would have controlled the general verdict. The jury found specially that the appellee did not possess sufficient capacity to understand and appreciate the hazards of the position he was employed in, so, in any event, the matter of instructions would not have exculpated the appellants upon that theory of the case. It is not material error to reject an interrogatory which, however answered, will not control the general verdict: *Louisville etc. Ry. Co. v. Pedigo*, 108 Ind. 481.

We have considered all of the questions discussed by counsel for the appellants, and find no material error in the record.

Judgment affirmed, with costs.

MASTER AND SERVANT—ASSUMPTION OF RISK—DEFECTIVE APPLIANCES.—If a servant has equal knowledge with the master as to the machinery used or means employed in the performance of the work he is required to do, and a full knowledge of existing defects, it does not necessarily follow that his master is liable for injuries sustained by reason of the use thereof: *Meador v. Lake Shore etc. Ry. Co.*, 138 Ind. 290; 46 Am. St. Rep. 384, and note. A railroad company is guilty of negligence in failing to keep appliances used by its servants in repair, and such servants, knowing of defects in such appliances, do not assume the risk of injury arising from their use, unless the danger is glaring and obvious: *Settle v. St. Louis etc. R. R. Co.*, 127 Mo. 336; 48 Am. St. Rep. 633, and note.

MASTER AND SERVANT—MINOR SERVANT—ASSUMPTION OF RISK BY.—Whether a minor servant is of sufficient age, intelligence, discretion, and judgment to bring him within the rule that a servant assumes the risk of such dangers of his employment as he ought to observe and comprehend, is a question for the jury: *Luebke v. Berlin Machine Works*, 88 Wis. 442; 43 Am. St. Rep. 913, and note.

MASTER AND SERVANT—DUTY OF MASTER TO INSTRUCT INEXPERIENCED SERVANT.—When young persons, without experience, are employed to work with dangerous machines, it is the duty of the employer to give suitable instructions as to the manner of using, and warnings as to the danger in carelessness in their use. If the employer neglects this duty, or if he gives improper instructions, he is answerable for the injury resulting from this neglect of duty: *Tagg v. McGeorge*, 155 Pa. St. 368; 35 Am. St. Rep. 889, and note; *Neilson v. Hillside Coal etc. Co.*, 168 Pa. St. 256; 47 Am. St. Rep. 886, and note; extended note to *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 28.

MASTER AND SERVANT—LIABILITY TO INCOMPETENT SERVANTS.—A master is liable for injuries sustained by a boy, who, without being instructed, is ordered to perform a service, the hazards of

which, on account of his immature age, he is incapable of appreciating, although they are visible, or whose mind is so immature that, though he has been cautioned, he is incapable of appreciating the warning, or of safely performing the service required of him: *Brazil etc. Coal Co. v. Gaffney*, 119 Ind. 455; 12 Am. St. Rep. 422. See, also, the note to *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 29.

McCoy v. OLDHAM.

[1 INDIANA APPEALS, 372.]

PLEADING.—IN ACTIONS FOR MONEY HAD AND RECEIVED by the defendant for the use of plaintiff, a bill of particulars is not required. If any uncertainty exists, it can be remedied by motion to make the complaint more specific.

BILL OF PARTICULARS.—If the items of any account in respect to amounts, dates, and what accrued are particularized in the body of the complaint, no other bill of particulars need be filed.

TRIAL—RIGHT TO JURY.—In determining what suits are triable by jury, the court must look to the character of the questions to be decided, and if they are essentially of an equitable nature, or if some essentially equitable remedy is invoked, as contradistinguished from legal questions and remedies, the case should be tried by the court. Otherwise, the parties are entitled to a jury.

TRIAL BY JURY CAN BE DEMANDED in an action by the assignee of an account.

JUDGMENT AS EVIDENCE OF LEASE.—In an action to recover rent due, a judgment for the tenant against the landlord for possession of the leased premises, is admissible in evidence to prove the execution of the lease.

BREACH OF COVENANT TO REPAIR.—Upon a breach of a covenant by a landlord to repair, the tenant may repair, and recover the cost thereof from the landlord; or he may rely upon the covenant, and recover all damages proximately flowing from a breach thereof, regardless of the expense or trouble required to make such repairs.

BREACH OF COVENANT TO REPAIR—MEASURE OF DAMAGES—SETOFF.—In an action by a landlord to recover rent due, the tenant may set off against his claim the decreased rental value of the premises caused by the breach by the landlord of his covenant to repair the leased premises.

E. M. Swan and C. B. Laird, for the appellant.

S. B. Hatfield and J. A. Hemenway, for the appellee.

373 CRUMPACKER, J. William Bratcher leased to Christopher C. McCoy a tract of land containing thirty acres, in Spencer county, for the term of three years from the first day of January, 1886, at and for a rental of one hundred and fifty dollars per year. At the time the contract was made, about ten acres of the leased premises were covered with logs, brush, and grubs, and

was unfit for cultivation, and the lessor agreed, as part of the contract, to grub, clear, and subdue that portion of the land so it would be fit for the plow by the 1st of March, 1886.

He failed to give possession under the contract, and McCoy sued him therefor, and, obtained a judgment for possession, in the Spencer circuit court, on the twenty-eighth day of April, 1886, and for costs, and, within a few days after the judgment was obtained, the lessor surrendered the premises to McCoy, who held and occupied them until January 1, 1889, under the lease. Bratcher failed to grub and clear that portion of the land which was unsubdued and unfit for cultivation, and it remained in that condition until the expiration of the lease. In the judgment for the possession of the premises the finding of the court recites the terms and conditions of the lease, although no special finding was requested.

Bratcher subsequently assigned, in writing, the rent accrued and to accrue under the lease to Oldham, and the assignment ³⁷⁴ was indorsed upon the margin of the record of the judgment for possession. This action was brought by Oldham, as assignee, to recover the rents due under the lease.

The complaint is in four paragraphs. The first is the common count for money had and received by McCoy for the use of Oldham. The second is for rent due the plaintiff from the defendant for the use and occupation of the leased premises, particularly describing them, to the amount of five hundred dollars, which was due and wholly unpaid. In the third paragraph it is alleged that Bratcher demised a certain described tract of land to the defendant for a term of three years, at a rental of one hundred and fifty dollars a year, and that he afterward sold and assigned by a written instrument all of the rent accrued and to accrue to the plaintiff; that the same, amounting to five hundred dollars, was due and wholly unpaid.

The fourth paragraph recites the contract and subsequent suit and judgment for possession under the lease, and the finding of the terms of the lease in the record, and the assignment in the lease and rents accruing thereunder to the plaintiff upon the judgment docket, and that the rent for the whole time was due and unpaid. A separate demurrer was filed to each paragraph of complaint and overruled. An answer was then filed consisting of four paragraphs. The first was the general denial. The second was a setoff. The third was in the nature of a counterclaim, alleging the covenant upon the part of the lessor to grub and clear the unsubdued portion of the land, his failure so to do, and damages to the amount of several hundred dollars, which was asked to be re-

couped against the claim for rent. This paragraph further alleges that Bratcher failed to put the defendant in possession of the premises under the lease, but wrongfully withheld the same from him, and he was compelled to bring suit for the recovery thereof, and in so doing ³⁷⁵ incurred expenses amounting to a large sum, which was also asked to be recouped from the plaintiff's demand. The fourth paragraph was a plea of payment.

A reply was filed which put the cause at issue, and when it came on for trial the plaintiff demanded a jury, and the defendant objected, on the ground that the cause was one purely of equitable cognizance and was not triable by jury. The objection was overruled and exceptions entered, and the cause was tried by a jury. A verdict was returned in favor of the plaintiff below.

The appellant filed a motion for a new trial, assigning fourteen causes, which was overruled and judgment was rendered upon the verdict.

The alleged errors relied upon for the reversal of the judgment in this court are in overruling the demurrers to the first and second paragraphs of complaint, and overruling the motion for a new trial.

The only objection pointed out to the first and second paragraphs of complaint is that no bill of particulars of the indebtedness sued upon was filed with either of them. In actions for money had and received by the defendant for the use of the plaintiff the practice does not require a bill of particulars. If any uncertainty exists it can be remedied upon motion for more specific information: *State v. Sims*, 76 Ind. 328. Thus the objection is disposed of as far as it relates to the first paragraph.

In the second paragraph the amount of the demand is definite, the date upon which it became due is given, and the real estate for the use of which it accrued is particularly described; so but little, if any, additional information would have been furnished by a bill of particulars.

Where the items of any account in respect to amounts, dates, and for what accrued are particularized in the body of the complaint, no other bill of particulars need be filed: *Wagoner v. Wilson*, 108 Ind. 210.

³⁷⁶ The court did not err in overruling the demurrer.

One of the reasons for a new trial to which our notice is directed was error in allowing the appellee a jury as a matter of right.

It is claimed on behalf of appellant that the suit, being brought by the assignee of an account, was one of exclusive equitable cognizance under the law as it was prior to the 18th of June, 1852,

and, under the force of section 409 of the code of 1881, was not triable by a jury.

It is true, the common law does not authorize the assignment of choses in action generally, but it recognizes equitable assignments to the extent that the assignee of such a claim may prosecute an action in the name of the assignor to enforce it for his own benefit. In courts of chancery, the equitable owner can sue in his own name and enforce collection by making the assignor a party to answer to his interest. There is no statute in this state expressly authorizing the assignment of accounts, but the rights of the assignee are generally recognized and section 251 of the code requires all suits to be brought in the name of the real party in interest, whether his title be legal or equitable. So it may be said that the right of the assignee of an account to enforce its collection in a court does not depend upon principles of equity jurisprudence, but upon the express terms of a positive statute, and where this is the case the provisions of section 409 of the code of 1881, do not apply: *Kitts v. Willson*, 106 Ind. 147.

The assignor of the account in suit was not made a party to answer to his interest, but no objection seems to have been taken to that. There was no denial of the assignment, except the general traverse, and the question of the assignment was not treated as an issuable fact at the trial.

In determining what suits are triable by jury, the court must look to the character of the questions to be decided, and if they are essentially of an equitable nature, or if some essentially equitable remedy is invoked, as contradistinguished ³⁷⁷ from legal questions and remedies, the case should be tried by the court; otherwise the parties will be entitled to a jury: *Martin v. Martin*, 118 Ind. 227. There was no error in allowing a jury in the case at bar.

The court admitted in evidence, over the objection of the appellant, the record of the judgment in the suit of *McCoy v. Bratcher* for the recovery of the premises under the lease. It is argued that the finding of the court ascertaining the terms of the lease, having been made by the court voluntarily and without the request of either litigant, had no binding force, and should have been excluded on that account. This record was competent to prove the fact of the lease, if not its terms, and was admissible for that purpose, so no error occurred in permitting it to be read.

The appellant offered evidence upon the trial tending to prove the difference between the rental value of the leased premises as

they were, and what the rental value would have been if appellee had grubbed and cleared the unimproved portion according to the agreement. This evidence was excluded, upon the theory that the measure of damages resulting from the appellee's failure to reduce the land to a condition of cultivation was the reasonable cost of having that work done, and not the diminution of the rental value resulting from the failure. This ruling of the court is insisted upon as error.

There is some conflict in the adjudications of the courts of last resort upon this question. It is held by some that upon the breach of a covenant upon the part of the landlord to repair leased premises, it is the duty of the tenant to make the repairs, and he can only recover the reasonable cost thereof from the landlord. These cases also hold that if the landlord induces the tenant to believe that he will perform his covenant, and the tenant, relying upon such inducement, fails to repair, he may recover such special damages as may result during the time he was so misled, and while he is engaged in making the repairs. This doctrine is founded upon ²⁷⁸ the principle that one will not be permitted by his own fault or inattention to unnecessarily suffer damages to his property to be enhanced and then recover them from the original wrongdoer.

Upon the other hand, the unquestioned weight of the authorities is, that in such cases the tenant has two remedies, and he may elect which he will pursue. He may repair the premises and recover the cost thereof from the landlord; or he may rely upon the performance of the covenant by the landlord, and in the event of its breach recover all the damages proximately flowing therefrom, regardless of the expense and trouble that would have been required to have made the repairs; and upon the latter theory the measure of recovery would be, ordinarily, the diminution of the rental value, on account of the failure to keep the covenant.

Thus, in *Myers v. Burns*, 35 N. Y. 269, the court said: "The defendant had two different remedies, of either of which he could have availed himself, in the event of the plaintiff's failure to repair, after due notice. He could have made the repair himself, and have called upon the plaintiff to refund the expense, as he actually did in the case of the painting; or he could have called upon the plaintiff to take the ordinary responsibility of a party failing to perform his contract, to wit, to pay the damages caused by such failure, as he did in regard to the item in question. In the first case, the rule confines the damages to the actual expense, if no special damage is shown; but in the other, the

cost of the repair is not an element in the case. It is as if there was no such right to repair on the part of the lessee, but the claim rested solely in damages."

In the case of *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134, it was held that where the landlord agreed to keep the fences in repair, the tenant had the right to rely upon his performance of the agreement, and, in the event of a failure, could recover damages for the destruction of crops resulting therefrom, although the tenant could at small expense have procured ³⁷⁹ material and repaired the fence himself, but he was not bound to do this.

The same rule of law is expressly affirmed in the following cases: *Hexter v. Knox*, 63 N. Y. 561; *Vandegrift v. Abbott*, 75 Ala. 487; *Prescott v. Otterstatter*, 79 Pa. St. 462; *Hoy v. Grenoble*, 34 Pa. St. 9; 75 Am. Dec. 628; *Dempsey v. Hertzfield*, 30 Ga. 866; *Hinckley v. Beckwith*, 13 Wis. 34; *Rockford etc. R. R. Co. v. Beckemeier*, 72 Ill. 267; *Chicago etc. R. R. Co. v. Ward*, 16 Ill. 522.

And the rule finds strong support in the decisions of the supreme court of this state: *Chicago etc. Ry. Co. v. Barnes*, 116 Ind. 126; *Block v. Ebner*, 54 Ind. 544; *Buck v. Rodgers*, 39 Ind. 222; *Indiana etc. Ry. Co. v. Moore*, 23 Ind. 14; *Williams v. Oliphant*, 3 Ind. 271.

The doctrine supported by this array of authorities is the sounder in principle and more in harmony with the general rules of law fixing the liability for the breach of kindred covenants. It is well understood that if one sells property and covenants against encumbrances, and it should be encumbered, the covenantee would have the right, when necessary to protect his title, to discharge the encumbrance and recover the costs thereof from the covenantor, but he is not compelled to do so. He may suffer the property to be sold upon the encumbrance and the title to be divested, and then recover the entire purchase money, with interest, from the covenantor, without regard to the fact that the encumbrance might be disproportionately small as compared to the value of the property or the purchase price.

One who, for a sufficient consideration, agrees to perform an act and fails cannot complain if he is required to bear the natural and proximate consequences of his failure. We need not decide what the rights of the parties would be if the thing to be done should be of a trifling nature as compared to the consequences that might flow from a failure to do it.

In the case before us, the landlord agreed to clear and ³⁸⁰ grub about ten acres of land, and the consequences of a failure would be the loss of the use of that part of the land.

We are of the opinion that the appellant was not required to disarrange his own plans or subject himself to any considerable expense or inconvenience in order to save the appellee from damages resulting from his own breach of duty. It is argued that in the judgment for possession the appellant obtained an unqualified order for possession, and Bratcher had no right thereafter to enter upon the premises to do the clearing. There is no merit in this claim. There is always an implied reservation of the right of entry to repair, where the landlord covenants to do so. And, furthermore, Bratcher did not offer to do the work, or tender performance, consequently he is in no attitude to assert that it was the appellant's fault that he did not keep his agreement. The evidence offered should have been admitted.

We need not decide other questions discussed under the motion for a new trial, as they may not occur upon another trial.

The judgment is reversed, with instructions to the trial court to sustain the motion for a new trial.

Reinhard, J., took no part in the decision of this case.

BILL OF PARTICULARS is considered in some respects as an amplification of the declaration, but it is sufficient if it fairly apprise the opposite party of the nature of the claim, so there can be no surprise: *Wright v. Dickinson*, 67 Mich. 580; 11 Am. St. Rep. 602.

ASSUMPSIT.—Sufficiency of the pleading in is discussed at length in the extended note to *Allen v. Patterson*, 57 Am. Dec. 545.

TRIAL BY JURY IN CIVIL CASES—RIGHT TO.—All issues of fact must be tried by a jury if a party desires to have them so tried, and the court should grant him the privilege of such a trial, although the statute which gives him the remedy he is pursuing may be silent on the subject: *Scott v. Nichols*, 27 Miss. 94; 61 Am. Dec. 503. The right to have certain questions of fact passed upon by the jury in a civil action of equitable cognizance is a matter in the sound discretion of the court: *Saint v. Guerrerio*, 17 Col. 448; 31 Am. St. Rep. 320, and note.

LANDLORD AND TENANT—BREACH OF COVENANT TO REPAIR.—Covenants by a lessee to pay rent, and by the lessor to make improvements and repairs, without which the premises would be useless for the purposes leased, are mutual, and the lessor's failure to perform his covenant in a reasonable time, where no time is specified, justifies the lessee in abandoning the premises, but the lessee is liable for the rent for the time he occupied, less the damages sustained by him by reason of the improvements and repairs not having been made: *Lunn v. Gage*, 37 Ill. 19; 87 Am. Dec. 233, and note. See, also, the notes to *Eddy v. Coffin*, 14 Am. St. Rep. 442; *Woodruff v. Garner*, 89 Am. Dec. 489, and the extended note to *Polack v. Picche*, 95 Am. Dec. 123.

BRUMMIT v. FURNESS.

[1 INDIANA APPEALS, 401.]

NEGLIGENCE—SETTING OUT FIRE.—An owner has a right to kindle a fire upon his premises for the purpose of reducing his land to cultivation, providing he does so at a proper time, under ordinarily favorable circumstances, and in a reasonably prudent manner. In such case, he is not liable to an adjoining owner for injury arising from the spread of the fire, unless he is guilty of negligence in not using proper care to prevent its spread.

NEGLIGENCE—SETTING OUT FIRE.—One who negligently sets or negligently manages a fire set on his own property is liable to his immediate neighbor for damage caused to him by the spread of the fire onto such neighbor's property, whether the fire is communicated through the air or along or under the ground. The gist of the action is negligence. If that exists, either in setting or caring for the fire, and injury to another happens therefrom, liability attaches. It is immaterial whether such negligence is gross or only ordinary.

NEGLIGENCE — WHEN QUESTION OF LAW.—When the facts in a negligence case are specially found, either by the court or the jury, it is then for the court to decide whether such facts amount, *prima facie*, to negligence.

SETTING OUT FIRE.—One who sets a fire on his own premises, immediately surrounded by highly combustible and inflammable material up to the very border of the adjoining owner's land, and from there on indefinitely, is guilty of negligence under any circumstances, and liable for the injury to his neighbor's property, if the fire is communicated thereto, whether he used ordinary precaution to prevent the fire from spreading or not.

E. D. Crumpacker, for the appellant.

H. A. Gillett, for the appellees.

⁴⁰¹ REINHARD, J. Appellees sued the appellant in the court below for damages caused by fire escaping from the appellant's premises, and which burned and destroyed the fences, peat soil, and crops of the appellees. It was alleged that the injury was caused by the negligence of the appellant in setting the fire and allowing it to escape therefrom and enter upon, ignite, and burn the property of the appellees.

Issues were joined, there was a trial by jury, and a special verdict was returned, upon which the court rendered judgment in favor of the appellees.

The only question discussed by counsel is that of the sufficiency of the special verdict to authorize the judgment rendered thereon by the court.

The jury found that the appellees were the owners and in possession of the forty acres of land described in the complaint ⁴⁰² as belonging to them; that they were also the owners of twenty

acres of hay, of the value of one hundred and five dollars, also four acres of growing corn, and two hundred rods of post and rail fence—all of which property was situated on the real estate aforesaid; that the appellant was the owner and in possession of forty acres of land immediately adjoining that of the plaintiff on the west; that both said pieces of land were composed mainly of peat marsh from one foot to six feet deep, and the appellees' was principally grass ground and had recently been mowed over, at the time of the injury complained of; that early in the month of May, 1887, the defendant dug a small ditch one spade deep and two spades or about sixteen inches wide around about one acre of his said land adjoining that of the plaintiffs, the ditch on the east side of said acre being about three feet from the division fence between plaintiffs and defendant; that in digging said ditch he had thrown the material upon the space between the same and said fence, and the material so thrown out had, at the time of the setting of the fire hereinafter mentioned, become dry and inflammable, and such space was also covered to some extent with dry and inflammable grass and weeds; that on the fourth day of August, 1887, the defendant set fire to the place so surrounded by said ditch, which fire immediately ran over the same and burned off the stubble, and, at the same time, the defendant set fire to the dry peat at various points on said acre for the purpose of burning off such peat to reduce the land to the condition for raising cranberries; that the defendant allowed the fire to burn until the evening before its escape, as hereinafter mentioned, and during the intervening time the defendant also caused the said ditch on the east side to be deepened to the extent of one spade more; that the defendant left the fire on the evening of the ninth day of August, aforesaid, and did not return to the same until about half past eleven o'clock on the forenoon of the next day, but during the said forenoon his hired man was at work cutting ⁴⁰³ hay for himself something over a quarter of a mile from said fire and in sight thereof; that when the defendant was there at half-past eleven o'clock, as aforesaid, the fire was still burning, but confined to the defendant's land, and he and his hired man then went away half a mile to dinner; that while they were gone, and within an hour after the defendant left, the said fire escaped from his said land, and, by means of flying sparks and embers, jumped the said ditch on the east, and caught in and set fire to the inflammable material on the east side thereof, and from thence ran along the stubble over the plaintiffs' land and continued to burn thereon, and the soil thereof, until the grass sod was destroyed, the peat burned to an uneven depth,

and in many places down to the water level of the drainage system of said land, and thereby the said land was injured and damaged to the extent of one hundred and fifty dollars; the said hay was burned and destroyed, the said hay rake was burned and destroyed, the said growing corn was burned and injured to the extent of thirty-eight dollars, and plaintiffs' fence burned and injured to the extent of thirty dollars; that at the time the defendant set said fire, and while the same was burning on his land, the weather was very dry and hot, there having been no rain since the third day of July previous; that the peat on the lands of both parties was unusually dry and inflammable, and there was also within and near the surface of the defendant's said burning piece many old decayed roots and limbs of trees, some of which extended to the margin of said ditch on the east; that fire burning in such soil ordinarily burns and smolders in the peat, eating into the same, burning under the surface, and running along the sticks and roots, and coming out in new places for an indefinite length of time, and until put out by heavy rains, or subdued by active means, and is liable and likely to, and often does, in moderate wind, fly through the air and ignite combustible matter to a distance of several feet; that some of the plaintiffs and many neighbors, when they became aware of the fire, ran to the ⁴⁰⁴ same and attempted to beat it out, and arrest it, but that it was impossible so to do, the same having become wholly uncontrollable; that at the time the fire communicated with plaintiffs' lands, and the time the defendant was there, at half-past eleven o'clock, a fairly fresh breeze was blowing, but not with more force or velocity than winds ordinarily are in such season during three or four days in the week; that the manner in which fires so burn and operate in such lands as the defendant's, and the manner in which they so spread through the air, were known to men of ordinary experience before and during all the time of said fire, and that there was no independent or unusual cause intervening to produce the fire, which injured the plaintiffs' property, other than the fire so set and encouraged by the defendant. The remainder of the special verdict relates to the amount of the damages in case the finding is for plaintiffs.

It is insisted by the appellant that these facts do not show any negligence on his part, either in setting the fire or in suffering it to escape, and hence the judgment should have been for the appellant.

It is an old maxim that every man should so use his own property as not to injure that of his neighbor. It does not follow from this, however, that a man necessarily renders himself liable

for damage in every instance where, as a consequence of the use of his property, injury may result to another.

It seems that the old common-law rules in relation to the escape of fire from the premises of a *terretenant* to those of his neighbor were much more rigorous against the interest of the former than under modern laws. To such an extent was this the case that it was considered the duty of everyone, when a fire broke out in his house or field, to control it so as to prevent injury to his neighbor, the question of negligence not entering into the consideration at all, and if he failed to so control it, and damage resulted to his neighbor, he was liable to him for it: See *Bennett v. Ford*, 47 Ind. 264.

⁴⁰⁵ By the statutes of 6 Anne, chapter 31, and 14 George III, chapter 78, this liability was taken away in the case of "any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin."

The construction placed upon these statutes was such that the word "accidentally" was held to exclude all idea of negligence, and hence, in cases of negligent burning, the liability remained the same as before. But as an effect of these statutes the burden of proving negligence in actions therefor was cast upon the plaintiff, and it was no longer required to use the highest degree of diligence in the control of fires, but only "that required of a prudent man in the provident conduct of his business": *Beven on Negligence of Servants*, 978, et seq.

Both the decisions and the text-books contain much subtle learning and discussion upon the subject of how far a man's duties will require him to go in the exercise of proper diligence in cases of accidental fires; but the question with which we are more directly concerned in the case in hand is the kind of diligence required where the act of kindling the fire is one that was done intentionally by the party sought to be charged with liability.

Ordinarily, the owner or occupant of land has a right, doubtless, to set fire to rubbish and such useless articles as he desires to put out of his way so as to prepare the soil for cultivation. All the law requires of him under such circumstances is to use reasonable care and prudence to confine the fire to his own premises, and the party seeking to hold him liable for damages done by it is required to prove, by a preponderance of the evidence, that the injury was the result of his negligence. There may be circumstances, however, when it would be considered *prima facie* negligence in him to start the fire.

In *Hewey v. Nourse*, 54 Me. 256, Dickerson, J., speaking for the court, says: "Every person has a right to kindle a fire on his

own land for the purpose of husbandry, if he does it at a proper time and in a suitable manner, and uses reasonable ⁴⁰⁶ care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant."

It may be said that, as a general rule, there must be some proof of the negligence, aside from the fact of the fire itself, before liability will attach, but it is not required that there should be proof of negligence both in the setting of the fire and in properly guarding it afterwards. The Indiana case cited by the appellant's counsel does not attempt to enunciate a different doctrine: *Pittsburgh etc. Ry. Co. v. Culver*, 60 Ind. 469. It is held in that case merely that, as a matter of pleading, negligence must be set up in permitting the fire to spread, as well as in the kindling of it: See, also, *Louisville etc. Ry. Co. v. Ehlert*, 87 Ind. 339; *Indiana etc. Ry. Co. v. McBroom*, 91 Ind. 111.

It is held in Minnesota that though the owner of land has a right to set fire to his grass and stubble thereon, for purposes of cultivation, yet he must select such a time, and do so in such a manner and under such circumstances, as make it appear probable that injury to others will not follow: *Dewey v. Leonard*, 14 Minn. 153. See, also, *Krippner v. Biebl*, 28 Minn. 139.

In New York it was held that liability attaches in a case where fire is kindled by one on his own premises, if the fire was either started or suffered to spread by his own negligence: *Webb v. Rome etc. R. R. Co.*, 49 N. Y. 420; 10 Am. Rep. 389. In that case, Folger, J., speaking for the court, said: "We have the common-law principle well established and thoroughly ⁴⁰⁷ recognized and still existing to this extent: that he who negligently sets or negligently manages a fire in his own property is liable to his immediate neighbor for the damage caused to him by the spread of the fire onto his neighbor's next adjacent property."

In a case decided in Pennsylvania, it was adjudged that greater caution is required when dealing with a subject of risk than under ordinary circumstances, and that a man is answerable for the consequences of negligence which are natural and probable, and might, by the exercise of ordinary prudence and forecast, have

been foreseen; while if his fault happen to concur with something extraordinary and not likely to be foreseen, he will not be answerable: *McGrew v. Stone*, 53 Pa. St. 436.

In a Massachusetts case it was said: "A man who negligently sets fire on his own land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his land to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated": *Higgins v. Dewey*, 107 Mass. 494; 9 Am. Rep. 63.

In our own state it is held that it is incumbent upon the party on whose premises fire originates to exercise greater care and caution in the ratio in which the risk becomes greater: *Gagg v. Vetter*, 41 Ind. 228; 13 Am. Rep. 322; *Collins v. Groseclose*, 40 Ind. 414; *Pittsburgh etc. R. R. Co. v. Nelson*, 51 Ind. 150. And it was said, in an early case in Indiana, that if the injury is the natural and probable consequence of the act, and such as any prudent man must have foreseen, the defendant will be held liable: *Durham v. Musselman*, 2 Blackf. 96; 18 Am. Dec. 133; approved in *Sisk v. Crump*, 112 Ind. 504; 2 Am. St. Rep. 213. See, also, *Young v. Harvey*, 16 Ind. 314; *Cooley on Torts*, 509.

It is sometimes a matter of considerable difficulty to determine ⁴⁰⁸ whether a given state of facts does or does not amount to negligence. Where the facts are specially found, however, either by the court or jury, it becomes the province of the court to decide whether such facts amount, *prima facie* at least, to negligence.

It is said by an author in high standing that "there may be no direct proof of negligence; yet the way in which an injury is done may be such that negligence is the most probable hypothesis by which it can be explained, and, when this is so, the defendant must disprove negligence by showing that he exercised due care": *Wharton on Negligence*, 871.

It is insisted by counsel for appellant that there are no facts found by the jury which, upon their face, make a case of negligence, either in kindling or in guarding the fire.

The appellant had a right, as we have seen, for the purpose of reducing his land to a state of cultivation, to kindle the fire upon his premises, if he did so at the proper time, and under ordinarily favorable circumstances, and in a reasonably prudent manner.

The facts, it is true, do not show that when the fire was kindled there was any unreasonably high wind or other unfavorable atmospheric condition, excepting that it was unusually dry and

hot. But the facts do show this, and, further, that there had been no rain for more than a month past, and that the peat on the lands of these parties was unusually dry and inflammable.

The facts found further show that there were many old decayed roots and limbs of trees extending from the appellant's land to the border of the land of the appellees; that fire burning in lands of the nature of these ordinarily burns and smolders in the peat, eating into the same, burning under the surface and running along the sticks and roots and coming out in new places for an indefinite length of time, and till the same is put out by heavy rains or subdued by active means, and is liable and likely to, and often does, in moderate wind, fly through the air and ignite combustible ⁴⁰⁰ matter to a distance of several feet; that the manner in which fires burn and operate in such lands was known to men of ordinary experience before and during the time of the fire; that there was no independent or unusual cause intervening to produce the fire which injured the appellees' property other than the fire set and encouraged by the appellant.

The appellant admits that if "the original setting out of the fire was such that its escape, under ordinary conditions and circumstances, would be a natural and ordinary sequence," this would be such negligence as to charge him with liability. This, we think, cannot be controverted. We think it is shown by the special verdict that the condition of the atmosphere and of the material to be burned was such, at the time chosen to kindle the fire, that sparks would almost inevitably fly into the highly combustible material adjacent to the appellant's soil and ignite it, and that men of ordinary prudence would know and recognize this principle also appears amply from the facts found.

This is not the case of the burning of ordinary dead timber or fallow. The care and prudence to be exercised depend, in a great measure, upon the quality and character of the material surrounding the fire, as well as the condition of the atmosphere. Thus it was said in the case of *Webb v. Rome etc. R. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389: "But if, in a time of extreme drouth and high wind, there be laid or suffered to gather a train of readily combustible matter up to the bounds of another's property, it is not to be denied that it is an act of negligence to drop fire at the hither end of that train; nor but that it is an ordinary, a usual, a necessary result, reasonably to be expected, that the fire will run from particle to particle through it, and catch in whatever will burn which is adjacent at the thither end."

And so we think it quite analogous to reason that where the fire is immediately surrounded by highly combustible and in-

flammable material up to the very border of the adjacent ⁴¹⁰ proprietor's soil, and from there on indefinitely, it cannot be denied that it is an act of negligence to kindle such fire; and that it is a sequence reasonably to be expected that the slightest breeze will carry sufficient sparks of fire into such combustible matter and ignite it, consuming whatever property will burn which lies in its pathway: See Louisville etc. Ry. Co. v. Nitsche, 126 Ind. 229; 22 Am. St. Rep. 582.

We therefore conclude that the appellant was guilty of negligence in setting the fire, and that the court below correctly adjudged so.

If this be true, then it can make no difference whether the appellant used ordinary precaution to keep the fire from spreading or not. The digging of the ditch one spade deep, or a hundred feet deep, could not have prevented the flying of the sparks, which the jury found were the immediate cause of the communication of the fire from appellant's land to the inflammatory material on the land of the appellees. Nor could the careful watching of the appellant and his hired hand avail to arrest the flight of the disastrous sparks. There was absolutely no safeguard after the setting of the fire, excepting its extinction.

We hold, then, that the facts found by the jury make a prima facie case of negligence against the appellant, and that the court committed no error in rendering judgment in favor of the appellees.

The judgment is affirmed, with costs.

Crumpacker, J., having been of counsel below, took no part in the decision of the questions involved in this case.

NEGLIGENCE—SETTING OUT FIRES.—The general rule is well settled that when a private owner of property sets out fire upon his own premises for a lawful purpose, or a fire accidentally starts thereon, he is not liable for the damage caused by its communication to the property of another, unless it started through his negligence or he failed to use ordinary care and skill in controlling or extinguishing it: Extended note to McNally v. Colwell, 30 Am. St. Rep. 501. See, also, the extended note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 823.

NEGLIGENCE—WHEN A QUESTION OF LAW.—If the evidence in a cause is plain and positive, admitting of no doubt or controversy, the question of negligence is for the court as a question of law: Harris v. Cameron, 81 Wis. 239; 29 Am. St. Rep. 891, and note. Negligence is never a question of law purely, unless the facts are wholly undisputed and admit of no conflicting inferences: Isham v. Post, 141 N. Y. 100; 33 Am. St. Rep. 766.

DOHERTY v. RAMSEY.

[1 INDIANA APPEALS, 580.]

EXEMPTIONS.—An assignor in an assignment for the benefit of creditors, who points out to the assignee certain property which he desires to have set aside to him as exempt, and which the assignee promises to so set aside at the time of the appraisement, may, if he is prevented by sickness from attending such appraisement, still claim his right to the exemption, and if the whole property is sold by the assignee, the assignor may recover the amount of his exemption out of the assets of the property.

EXEMPTIONS.—If an assignor in an assignment for the benefit of creditors substantially pursues the method prescribed by statute in asserting his right to his exemption, and the assignee refuses to set off the exempt property to him, but converts it into the trust fund, the assignor is equitably entitled to the proceeds of the property which should have been set apart to him, and it is the duty of the court, on proper application, to order the assignee to turn such proceeds over to the assignor.

EXEMPTIONS.—If an assignor, prior to making an assignment for the benefit of creditors, transfers a large amount of money in fraud of them, but subsequently executes a voluntary written order surrendering all of such money to the assignee, he still has a right to claim his exemption out of the property assigned, and cannot be compelled to take such exemption out of the money fraudulently transferred.

FRAUDULENT TRANSFERS.—By the recording of an assignment for the benefit of creditors, the legal title to all of the property owned by the assignor at that time vests in the assignee, including any and all property that may have been sold, conveyed, or assigned by the assignor with the intent to defraud his creditors.

EXEMPTION — WAIVER.—The exemption to which an assignor in an assignment for the benefit of creditors is entitled, cannot be waived by him by contract made prior to the execution of the assignment.

EXEMPTIONS—FRAUD OF ASSIGNOR.—If the right to an exemption is conferred by express statutory terms, and does not depend upon an enlargement of statutory provisions by equitable construction, the previous fraud of a debtor in transferring, or withholding property subject to execution does not defeat his right to claim an exemption out of property assigned for the benefit of his creditors.

G. D. Hurley and M. E. Clodfelter, for the appellant.

T. H. Davidson, for the appellee.

531 CRUMPACKER, J. On the third day of September, 1889, Marshal D. Doherty executed a deed of assignment of all his property, for the benefit of all his creditors, to Alexander F. Ramsey, as assignee, who assumed the duties of such trust. The deed of assignment was duly recorded, and the assignee proceeded to inventory and appraise the property, and thereafter sold the same in the execution of the trust.

The Montgomery circuit court had jurisdiction of the proceedings, and at the November term, 1879, of said court, Doherty filed a petition against the assignee, asking an order directing him to pay the petitioner, out of the assets of the estate, the sum of six hundred dollars, claimed by him under the exemption laws of the state.

532 The petition is in the following form:

“Your petitioner, Marshal D. Doherty, represents and shows to the court that heretofore, to wit, on the third day of September, A. D. 1889, he made an assignment of all his property, both real and personal, for the benefit of all his creditors, to one Alexander F. Ramsey, who accepted said trust, and is now his lawful assignee; that within thirty days after entering upon the duties of his trust, the assignee made, under oath, a full and complete inventory of all the property, real and personal, of the rights, credits, interests, profits, and collaterals which came to his hands, or of which he may have obtained knowledge as belonging to said assignor, and caused the same in said inventory to be appraised by two reputable householders of the neighborhood, who, before proceeding to discharge their duties, took an oath to honestly appraise the property mentioned in the inventory filed by the said trustee in the recorder’s office of Montgomery county, Indiana; that your petitioner is a resident householder of the state of Indiana, residing in the city of Crawfordsville, Indiana, and, as such, he is entitled to the benefits of the exemption laws of the state of Indiana, under section 703 of the Revised Statutes of 1881, to the amount of six hundred dollars, and that all of his indebtedness accrued since May 31, 1879, on contracts only; that at the time of the said inventory and appraisement, the assignor was sick and unable to get out of his house, but had, a few days previous thereto, seen the assignee, and requested and demanded of him that six hundred dollars in value of said property be appraised and set off to him as exempt from sale, for the payment of his debts; that said assignee, Ramsey, then and there agreed that buggies, carriages, and harness sufficient to make six hundred would be set off to him at their appraised value by the appraisers; that said assignor selected said buggies, carriages, and harness as the property he desired set off to him as exempt from sale, and expected said buggies, carriages, and harness would be set apart to 533 him as exempt from sale, for the payment of his debts, as such resident householder, by said appraisers, and he intended to be present at said appraisement, but, by his sickness, he was unable to be present at the time said inventory and appraisement were made, and the said assignee, Ramsey, failed and neglected

to have the appraisers set apart said property as exempt from sale, as he had theretofore demanded, and as said assignee had promised and agreed to do, and, without his, Doherty's, fault or neglect, said assignee neglected and refused to set said property off to him; that said assignee has now on hand a sufficient amount of money to pay him said sum of six hundred dollars.

"He therefore asks the court to make him an allowance of six hundred dollars in and out of said estate, that he is justly and legally entitled to under the law, and that said assignee be authorized by the court to pay said assignor said sum of six hundred dollars."

The assignee appeared to the petition and filed his answer thereto as follows:

"Alexander F. Ramsey, assignee herein, for answer to the petition of his assignor, Marshal D. Doherty, filed November 4, 1889, and numbered 2151, praying for an allowance on account of statutory exemption, says: That on the day before the execution of the indenture of assignment herein, the said Marshal D. Doherty transferred to the possession of one Oscar Street of Kansas City, Missouri, the sum of ten thousand two hundred dollars in money then belonging to him, the said Marshal D. Doherty; that said transfer was made without any consideration and for the use of said Doherty, and for the purpose of withholding said sum from the operation of his assignment; that after, the said Marshal D. Doherty executed to this defendant, as his assignee, an order on said Street for the payment of said sum of money, but that said Street has not paid the same and refuses to pay the same to defendant, and defendant says that he is now prosecuting a suit to recover said moneys. Wherefore ⁵³⁴ the defendant prays the judgment of the court in the premises."

A demurrer was filed to the answer, which was overruled and exceptions saved, and the petitioner declined to reply but elected to stand by his demurrer. Thereupon it was adjudged that he take nothing by his petition, and that he pay the costs thereof.

The overruling of the demurrer to the answer is the only error assigned in this court, but the consideration of this assignment of error involves the sufficiency of the petition as well as the answer.

The law requires an assignee to make a full and complete inventory of all the property owned by the assignor within thirty days after he enters upon the execution of the trust, and within twenty days after the preparation and filing of such inventory he shall cause all of the property mentioned therein to be appraised by two competent appraisers.

Section 2670 of the Revised Statutes of 1881 provides that if

the assignor be a resident householder of this state, the appraisers shall set off to him such articles of property mentioned in the inventory as he may select, not exceeding in value three hundred dollars. The amount of exemption provided by this statute was enlarged by implication to six hundred dollars by the act of March 29, 1879: *O'Neil v. Beck*, 69 Ind. 239.

In the case of *Graves v. Hinkle*, 120 Ind. 157, it was held that an assignor could avail himself of the right of exemption only by a substantial compliance with the requirements of section 2760 of the Revised Statutes of 1881, and that he must select the articles of property claimed by him as exempt from sale at the time and in the manner provided in that section; and, if he failed to do so, the right of exemption would be deemed to have been waived, and the property would all constitute a trust fund for the exclusive benefit of the creditors until they were all satisfied. The court said: "As against his deed, which transfers the title to the property, the assignor can only claim the right of exemption by pursuing the method ⁵³⁵ prescribed by the statute. He has a right to claim the amount out of real estate or personal property, or both, but, unless prevented from doing so without his own fault or neglect, he must assert his right in the manner and at the time prescribed by the statute."

In the case before us, the petition states that the assignor was a householder of this state, and that a few days before the appraisement he demanded of the assignee that property of the value of six hundred dollars be set off to him as exempt from sale, and that he then and there designated and selected the particular property so claimed by him, and the assignee promised to have the property so set apart at the time of the appraisement. The assignor was confined to his house by sickness when the property was appraised, and could not be present to again assert his right to exemption and again select the articles of property claimed by him, but relied upon the agreement of the assignee to protect his rights in the matter.

The law contemplates that the appraisement shall be made under the supervision of the assignee. Following the decisions of the supreme court requiring a liberal construction of the exemption laws in favor of the debtor, we are of the opinion that the petition shows a substantial compliance with the statute. At least enough is stated to rebut the presumption of a waiver resulting from the assignor's failure to be present and assert his right at the time of the appraisement.

Where the assignor substantially pursues the method prescribed by the statute in asserting his right to exemption, and the assignee

refuses to set off property to him, but converts it into the trust fund, the assignor is equitably entitled to the proceeds of the property which should have been set apart to him, and it is the duty of the court, on proper application, to order the assignee to turn such proceeds over to the assignor.

The petition in this case was sufficient, and the relief prayed ⁵³⁶ for ought to have been granted, unless the answer contained facts sufficient to defeat the right to exemption.

It is insisted that because the assignor transferred a large amount of money to one Street, for his own use, and to withdraw it from the operation of the assignment, he should not be allowed the right to the exemption expressly conferred upon him by the statute. It appears by the answer that the assignor had given the assignee an order on Street for the money so transferred to him, but Street refused to pay it over, and the assignee had a suit then pending for its recovery.

By the recording of the deed of assignment, the legal title to all of the property owned by the assignor at that time became vested in the assignee for the benefit of the creditors, including any and all property that may have been sold, conveyed, or assigned by the assignor with the intent to defraud his creditors: *Seibert v. Milligan*, 110 Ind. 106. Not only did the law bring the money fraudulently transferred by the assignor into the trust estate, but he executed a written order voluntarily surrendering to the assignee all of such property, so that it cannot be claimed that the assignor should receive his exemption from that fund.

This beneficent provision of the statute can only be invoked by one in the character of a householder, and was designed largely for the benefit of those dependent, in a measure, upon the debtor for support, and it cannot be waived by contract prior to the assignment or execution: *Maloney v. Newton*, 85 Ind. 565; 44 Am. Rep. 46.

Where the right of exemption is conferred by the express terms of the statute, and does not depend upon an enlargement of the statutory provisions by equitable construction, the previous fraud of the debtor in transferring or withholding property subject to execution will not defeat his right to claim exemption.

This doctrine was declared with much force and emphasis in the cases of *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607, and *Douch v. Rahner*, 61 Ind. 64. ⁵³⁷ See, also, upon the same subject, *Barkley v. Mahon*, 95 Ind. 101; *State v. Read*, 94 Ind. 108; *Over v. Shannon*, 91 Ind. 99.

Adopting the interpretation of the exemption laws laid down in these authorities, and which is manifestly just and in keeping

with the generally recognized principles regulating the administration of kindred statutory rights, we are required to hold the answer filed by the assignee insufficient to defeat the rights of the assignor to his exemption.

The judgment is reversed, with costs, with instructions to the trial court to sustain the demurrer to the answer, and proceed further in accordance with this opinion.

FRAUDULENT CONVEYANCES—EXEMPT PROPERTY.—Property exempt from execution is not susceptible of fraudulent alienation: *Derby v. Weyrick*, 8 Neb. 174; 80 Am. Rep. 827, and note.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—EXEMPTION.—Property which is exempt from execution does not pass by the statutory assignment to the assignee: *Note to McCulloh v. Price*, 43 Am. St. Rep. 641.

BUSHMAN v. TAYLOR.

[2 INDIANA APPEALS, 12.]

SALES—IMPLIED WARRANTY OF QUALITY—MEASURE OF DAMAGES.—In executory sales, as of a large quantity of brick to be delivered from time to time, an implied warranty of quality exists, and the purchaser is not bound to return the goods and rescind the contract, upon discovering a breach, but may set up his damages by reason thereof in a cross-action. The measure of damages is the difference in value between the articles sold and those delivered, at the time and place of delivery.

W. H. Bryan and W. R. Wood, for the appellant.

C. B., T. A., and W. V. Stuart, for the appellees.

¹³ REINHARD, J. Bushman was the owner and operator of a brickyard in the city of Lafayette, and the appellees, under the firm name and style of the Henry Taylor Company, were lumber dealers in the same city, and engaged in supplying builders and contractors with the necessary materials for the building and construction of houses. The appellees contracted with the appellant for a sufficient quantity of brick, estimated at from three hundred thousand to three hundred and fifty thousand, of a certain size and quality, necessary for the building of a school-house, to be erected by one Longwell, who had contracted with the appellees to supply him with the material for such building. Appellant agreed with the appellees, orally, that he would deliver the brick at the Cleveland, Columbus, Cincinnati & Indianapolis Railway yards in Lafayette, on board the cars, in such quantities

and at such times as they might be called for, during the summer and autumn of the year 1888, and at the price of five dollars per thousand. Appellant alleges in his complaint that, pursuant to this agreement, he delivered to appellees two hundred and sixty thousand brick, which, at five dollars per thousand, would amount to thirteen hundred dollars, and that appellees had only paid him one thousand and fifty dollars, leaving a balance of two hundred and fifty dollars still due him.

The appellees answered the general denial and payment, and also filed a counterclaim and a setoff. The cause was tried by a jury, and the verdict was for the appellees, who were the defendants below. The only error assigned and discussed by appellant's counsel is the overruling of the motion for a new trial. The causes enumerated in the motion for a new trial, and discussed by appellant's counsel, are, that the verdict is not sustained by sufficient evidence, and that the verdict is contrary to law and the evidence. Something is said, also, in the motion, in reference to some instructions given to the jury, but, as the question is not discussed in counsel's brief, we need not notice it.

In their counterclaim the appellees base their claim for damages upon two grounds: ¹⁴ 1. The inferiority of the brick; and 2. The failure of the appellant to supply the same as demanded.

It is agreed that appellant delivered, and appellees received, on board the cars in the railroad yard at Lafayette, two hundred and fifty thousand brick. The appellant claims that, as appellees accepted these goods and used them, they are bound to pay the contract price for them; that if appellees were not satisfied with them, they should have rejected them, upon examination, and that, in such cases, the rule of caveat emptor applies the same as in an executed contract. Appellant cites in support of this position 2 Sutherland on Damages, 407; 2 Kent's Commentaries, 479 (490); *Fellows v. Stevens*, 1 Blackf. 508; *Hadley v. Prather*, 64 Ind. 137.

The counterclaim proceeds upon the idea that the appellant's agreement to furnish the brick of a certain size and quality, and at a certain time, constituted an implied warranty.

The rule is now well settled that in executory sales such a warranty will be upheld. In such cases, the purchaser is not bound to return the goods and rescind the contract, upon discovering the breach, but may set up his damages, by reason thereof, in a cross-action: *Muller v. Eno*, 14 N. Y. 597; *Brigg v. Hilton*, 99 N. Y. 517; 52 Am. Rep. 63; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515 (519). And "where a chattel is to be made or supplied to the

order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer," if known to the seller when the order is given: Benjamin on Sales, sec. 644 (645). See, also, McClamrock v. Flint, 101 Ind. 278; Poland v. Miller, 95 Ind. 387; 48 Am. Rep. 730.

This is not a case of an executory sale of a single article, or of articles in such condition that, upon a full and thorough inspection, the purchaser accepts the same as a compliance with the contract.

¹⁵ In *Fellows v. Stevens*, 1 Blackf. 508, a case cited by appellant, it was held that the defect in the articles would be no defense, and could not be set up as such, by special plea or otherwise; but it is further held in that case that, "if, for any causes, the defendant has any good ground of complaint, he must seek his remedy by cross-action against the person with whom he contracted." This is just what appellees have done in this case.

The measure of damages in such cases is the difference between the articles sold and those delivered at the time and place of delivery: *Booher v. Goldsborough*, 44 Ind. 490; *Ferguson v. Hosier*, 58 Ind. 438; *Cline v. Myers*, 64 Ind. 304; *Hege v. Newsum*, 96 Ind. 426; *Blacker v. Slown*, 114 Ind. 322.

The evidence tended to prove that the difference in the brick sold and those delivered was fifty cents per thousand, making an item of damage of one hundred and twenty-five dollars, which, under the pleadings and the evidence, the jury had a right to find.

It was further claimed by appellees that, by the appellant's failure to furnish the brick in the quantities and at the times demanded, they were compelled to purchase brick elsewhere to make up the deficiency, and that they were put to an additional outlay. The evidence tends to prove this averment. Stilwell, the general agent and manager of the appellees, testified that he was obliged to purchase about thirty-six thousand extra brick of the kind contracted for with the appellant, and that he was obliged to pay, and did pay, seventy-eight dollars and fifty cents over and above the amount it would have cost if the appellant had delivered the kind of brick contracted for at five dollars per thousand.

The claim of appellant's counsel, therefore, that there was absolutely no evidence to show that appellees had sustained any damages, is not tenable. It is true that Longwell testified that he was the only person interested in the determination of the

case, but the appellees are not concluded by this statement. The jury still had the right to accept the testimony of Stilwell. Besides, Longwell's statement was but a ¹⁶ conclusion of his own, and, if the jury thought the facts did not warrant it, they were at liberty to disregard it. If, then, we add these two items of damages, we have an amount fully covering that which appellant claimed in his complaint was due him.

The evidence upon which these items were determined by the jury in favor of the appellees was conflicting, and while we are free to confess that upon its face the preponderance appears to be with the appellant, yet we have not been able to find any error of law which would authorize us to reverse the judgment. The verdict received the approval of the trial court, and we cannot interfere with it by undertaking to weigh the evidence.

Judgment affirmed.

SALES—IMPLIED WARRANTY OF QUALITY.—In the contract of sale, the law implies no warranty as to the quality of the goods sold: *Lanier v. Auld*, 1 Murph. 138; 3 Am. Dec. 680, and note; *Erwin v. Maxwell*, 3 Murph. 241; 9 Am. Dec. 602, and note; *Hyatt v. Boyle*, 5 Gill & J. 110; 25 Am. Dec. 276, and note; *Getty v. Roundtree*, 2 Pinn. 379; 2 Chand. 28; 54 Am. Dec. 138, and note, with the cases collected. See, also, the extended note to *Reed v. Randall*, 86 Am. Dec. 812.

SALES—BREACH OF WARRANTY—DAMAGES.—A purchaser of goods at an executed sale and upon warranty of quality by the seller does not, by receiving the goods without inspection, and retaining them after discovering their inferior quality, waive his right to recoup his damages for a breach of the warranty, in an action for the purchase price: *Woodruff v. Graddy*, 91 Ga. 333; 44 Am. St. Rep. 83. See, also, the notes to *Morse v. Moore*, 23 Am. St. Rep. 794; *Shearer v. Park Nursery Co.*, 42 Am. St. Rep. 129, and *Argersinger v. Macnaughton*, 11 Am. St. Rep. 691.

STEWART v. PENNSYLVANIA COMPANY.

[2 INDIANA APPEALS, 142.]

RAILROADS—FENCING AT STATIONS.—A railroad company is not required to fence its track at any of its stations.

RAILROADS—FENCING AT STATIONS—DEATH OF ANIMAL.—A railroad company is not liable for killing an animal which wanders upon the track at a station.

J. V. Mitchell, for the appellant.

S. O. Pickens, for the appellee.

¹⁴² ROBINSON, J. The appellant commenced this action against the appellee, before a justice of the peace, to recover the

value of a mare killed by one of the appellant's trains on the Indianapolis and Vincennes Railroad.

The case was appealed to the circuit court, and there tried by a jury, which returned a special verdict, upon which the court rendered judgment for the appellee.

¹⁴³ The action was under the statute to recover on the ground that the appellee had failed to fence its track where the mare entered upon it.

But one error is assigned, viz: The court erred in rendering judgment for the appellee on the special verdict of the jury.

Under the special verdict of the jury, the material and important facts found, to which it becomes necessary to refer, in the determination of the questions involved in the case, are "that the mare entered upon the railroad track immediately east of the south end of the passenger platform at Bethany Park station; that this platform is two hundred and fifty-one feet long, extending north from the intersection of a public highway with the railroad track at the south end of the platform referred to; that Bethany Park station is a station on appellee's railroad, used as such at times of camp meeting, for a period of about three weeks in each year, and occasionally by picnickers; that tickets are sold at all regular stations on the appellee's railroad for Bethany Park station; that it is also a freight station for such packages of freight as may occasionally be prepaid thereto"; that the diagram or map in the record, and made a part of the special verdict of the jury, correctly shows the situation and surroundings of the station in question.

The law defining the duty of railroad companies as to fencing their tracks at stations and sidings where passengers and freight are received and discharged, and exempting railroad companies from liability on account of stock killed, without negligence on the part of the company, which may wander upon the railroad track at such places, is now so well established as to require the citation only of the following cases as the latest decisions of the supreme court upon that question: *Indiana etc. Ry. Co. v. Quick*, 109 Ind. 295; *Bechdolt v. Grand Rapids etc. R. R. Co.*, 113 Ind. 343.

The counsel for the appellant concedes, in argument, that if Bethany Park was a station on appellee's railroad, within ¹⁴⁴ the meaning of the law as held in the cases cited and in the many cases in harmony with those cited previously decided by the supreme court, relieving railroad companies from fencing station grounds, then, under the facts found, the appellant was not enti-

tled to recover. But it is insisted by the appellant that, under the facts found by the jury, it is not shown that Bethany Park was a station on the appellee's railroad.

The fact that Bethany Park station is only used as such for a period of three weeks during the holding of camp meetings at Bethany Park Assembly Grounds and occasionally by picnic parties, we do not think sustains the proposition that Bethany Park was not in fact a station on appellee's railroad; nor does it affect the question as to the duty of appellee to fence its road at the point where the mare entered upon the railroad track.

Under the authorities cited, the question is clearly settled that railroad companies are not required to fence their tracks at stations where passengers are received or discharged. The number of passengers or the amount of freight that may be received at such station, or what trains stop to receive and discharge freight and passengers at such station, or whether such station may be a convenience to the public one season of the year more than another, or whether it may be used for the convenience of the public for the discharge of passengers and freight at a certain season of the year, cannot affect the question of the duty of fencing the track at such station by the railroad company.

A railroad station is a public place, where the public have the right to go, and for the convenience of the public station grounds, platforms and places where passengers can get on or off trains, and where freight may be shipped and received, must be open and accessible to the public; but the fact that the number of passengers or amount of freight received and discharged varies with the different stations on the different lines of railroads cannot affect the question involved ¹⁴⁵ in the case at bar, and, although the jury found that a fence could not be maintained at the point where the mare entered upon the track without interfering with the use, by defendant, of its track in the management and operation of its road and conducting its business, and without inconvenience to the public, this finding of the jury cannot override and control the fact they found, "that Bethany Park was a station for receiving and discharging passengers and freight," and the other facts found showing the location of the station and the situation of the platform, highway, and passenger shed; for it seems that the question is settled under the authorities cited, that when it appears that the place in controversy was a station where passengers and freight are received and discharged, as a question of law, the company is absolved from the duty of fencing the road at that place.

This court, in a recent case by Reinhard, J., held: "Whether

a company is or is not obliged to fence its road at a given point is a question of law, and not of fact. Where, therefore, the point at which the animal entered upon the track and its surroundings have been clearly established, it then becomes a question purely legal in its character, whether or not the company is bound to fence": *Jeffersonville etc. R. R. Co. v. Peters*, 1 Ind. App. 69.

The court committed no error in rendering judgment for the appellee on the special verdict of the jury.

Judgment affirmed, with costs.

RAILROADS—FENCING AT STATIONS.—The Texas statute imposing liability upon a railroad company for injuries done to stock, unless the railway is fenced, does not apply to such places as public necessity or convenience requires should be left unfenced, such as the streets of a city or town, depot or contiguous grounds, crossings of highways, and such other places: *International etc. R. R. Co. v. Dunham*, 68 Tex. 231; 2 Am. St. Rep. 484, and note. Depot grounds need not be fenced, and, in the absence of negligence, the company is not liable for cattle killed within such grounds: *Note to Missouri Pac. Ry. Co. v. Gedney*, 21 Am. St. Rep. 289.

McFARLAND v. LILLARD.

[2 INDIANA APPEALS, 160.]

BROKERS. — NO DISTINCTION EXISTS BETWEEN AGENTS TO SELL REAL ESTATE and agents to find purchasers therefor.

BROKERS—COMMISSION, WHEN DUE.—When a broker to sell land has found a purchaser ready and willing to buy upon the terms proposed by the owner, he has performed his part of the contract, and his commission is due, although, through the fault of the owner, the sale is not consummated.

BROKERS—COMMISSIONS—STATUTE OF FRAUDS.—If a real estate broker procures a purchaser, the owner cannot, after repudiating the contract of sale, defeat an action for the broker's commission, on the ground that such contract is void as within the statute of frauds because not in writing, unless it is agreed between the broker and the owner that such contract of sale shall be in writing.

BROKERS — COMMISSIONS — FINANCIAL ABILITY OF PURCHASER.—If a broker to sell real estate procures a purchaser, the owner cannot, after repudiating the sale on some other ground than the purchaser's financial inability to complete the purchase, defeat an action for the broker's commission on the last-mentioned ground, unless that ground is made an element of the contract between the broker and the owner.

BROKERS—COMMISSION—CHANGE IN TERMS OF SALE. Although the terms of sale made by a real estate broker differ from the original terms agreed upon by himself and the owner, he may recover his commission, if the terms upon which he sells are accepted by the owner.

R. Kimple, L. Walker, and W. B. McClintic, for the appellant
S. D. Carpenter and J. W. Eward, for the appellee.

¹⁶¹ REINHARD, J. Several errors are alleged in this cause, but as the merits of the appeal can be determined by the decision upon the sufficiency of the special verdict to support the judgment, we shall confine ourselves to that task alone.

The action was commenced before a justice of the peace, and was from there appealed to the circuit court, where the cause was tried by a jury and a special verdict returned, upon which, over appellant's objection and exception, the court rendered judgment in favor of appellee.

The suit was by a real estate broker for his commission on an alleged contract to sell a tract of land for the appellant.

The special verdict is as follows:

"We, the jury, having been required to return a special finding herein, find the following to be the facts:

"1. We find that on the eleventh day of August, 1887, the defendant entered into a written agreement with the plaintiff of which the following is a copy:

"Marion, Ind., Aug. 11th, 1887.

"If you will sell 200 acres, 175 acres under cultivation, at \$50 per acre, \$2,000 down, balance 1 to 10 years' time at 6 per cent, with privilege of 80 acres more if said sale is consummated within six months from date, I agree to pay L. C. Lillard two hundred dollars in cash, or if failure is my fault, then the above commission is due.

GEORGE McFARLAND.'

¹⁶² "Above land is situate in Jackson township, Miami county, Indiana.

"2. That in pursuance of said contract, the plaintiff endeavored to find a purchaser for the land described in said agreement. That within two weeks after the date of said agreement, plaintiff found a purchaser for said real estate, but under terms different from those mentioned in the above written agreement.

"3. We find that the plaintiff, in the month of August, 1887, informed the defendant that he had procured a purchaser for said real estate, and had agreed to sell the same to him, at and for the sum of two thousand five hundred dollars cash, and the remainder to be paid in two payments and within three years from date.

"4. We find that the defendant accepted said terms, and requested the plaintiff to send the purchaser, Allen J. Smith, to call and see him, the appellant, on the following Thursday.

"5. We find that said Smith called upon the defendant at the time he was requested so to do, and defendant accepted the terms of sale for said real estate, as made between the plaintiff and said Smith, and agreed to go with him to Peru on the next day to examine the title, and, if the title was found to be satisfactory, to execute the deed to said Smith for said real estate.

"6. We find that on the night of the day said Smith called on defendant, he, the defendant, went to said Smith, and informed him that his, defendant's, wife was dissatisfied, and that he could not make the trade; that he, defendant, expected the plaintiff would claim his commission for the sale of said land.

"7. We find that the defendant, before the commencement of this suit, acknowledged to John E. Eward that he was indebted to the plaintiff for commission for the sale of said real estate.

"If, upon the above facts, the law is with the plaintiff, we ¹⁶³ find for the plaintiff, and assess his damages at two hundred dollars and interest from the first day of September, 1887. If the law is with the defendant, we find for the defendant."

The appellant seeks to make a distinction, in the first place, between the case of an agent undertaking to sell and one undertaking to find a purchaser, claiming that in the case of an agent who undertakes to sell, he must not only find a purchaser, but must place the parties in such a position that the sale may be enforced between them by law.

We cannot find any meritorious distinction between the two classes of cases. The broker in either case is required to do no more than find a purchaser. He cannot do the selling unless specially authorized to do so by power of attorney. That must be done by the principal. The undertaking to "sell" in such cases is no more than an engagement to find a purchaser who is ready and willing to buy: *Treat v. De Celis*, 41 Cal. 202; *Duffy v. Hobson*, 40 Cal. 240; 6 Am. Rep. 617; *Goss v. Broom*, 31 Minn. 484; *Reynolds v. Tompkins*, 23 W. Va. 229. See, also, *Lockwood v. Rose*, 125 Ind. 588.

The appellant next insists that, before the appellee could recover, he must show that he had effected a bargain and sale which was mutually binding between the parties, and, as the contract to purchase was not in writing, it was void by the statute of frauds, and could not be enforced, and that consequently the appellee had failed to "sell," as contemplated by the contract.

In this view we cannot concur. When the appellee had found a purchaser who was ready and willing to buy upon the terms

proposed, he had performed his part of the contract, and the commission was due, although, through the fault of the appellant, the sale was not consummated.

The facts found show that it was the appellant who failed to carry out the contract of sale, and not the purchaser. If the appellant had been prevented from completing the sale by reason of the purchaser's taking advantage of his right under the statute of frauds, the appellant would have some ¹⁶⁴ room for complaint that the contract of his agent was not a binding one; but when the facts show, as they do here, that the only reason the contract was not binding was because the appellant himself refused to make it so, certainly he cannot be heard to complain, and thus take advantage of his own fault.

A broker may recover for services rendered, though the contract be in part void under the statute of frauds: *Freeman v. Sabine*, 18 Alb. L. J. 497; *Dennis v. Charlick*, 6 Hun, 21; *Redfield v. Tegg*, 38 N. Y. 212; *Cook v. Kroemeke*, 4 Daly, 268; *Barnard v. Monnot*, 3 Keyes, 203; *Mooney v. Elder*, 56 N. Y. 238.

The case of *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192, furnishes some color to appellant for the position he takes, but does not support him. In that case the agent furnished a purchaser and effected a sale of the real estate by written contract, which was mutually obligatory upon both vendor and purchaser. The vendee afterward refused to execute his part of the agreement. The vendor refusing to pay the commission to his agent upon the sale, the latter sued him. The court held that the principal was liable for the commission, because the agent had effected a sale that was binding on both parties, although not carried out by the purchaser.

We presume the court concluded that although the contract was repudiated by the purchaser, still, if the vendor was not disposed to enforce specific performance under the contract, it furnished no excuse to him for escaping the payment of compensation so fairly earned.

In the case at bar it is not the vendee who refused to carry out the contract of sale, but the principal himself.

In *Lane v. Albright*, 49 Ind. 275, the owner of the real estate agreed to pay the broker a certain commission if he would procure a purchaser within a reasonable time, which he did. The owner sold the real estate before the broker had found a purchaser, and yet the court held that the agent ¹⁶⁵ was entitled to his commission, having procured a purchaser afterward.

The court in that case says: "The appellant performed all that he was required by the contract to do, and was prevented by the appellee from selling the land. The appellee disabled himself from carrying out the contract of sale made by appellant. . . . The appellee cannot thus avoid the obligation of his contract."

The case of *Fischer v. Bell*, 91 Ind. 243, which the appellant cites, is still farther from sustaining him. In that case, the contract sued on was for procuring a purchaser, and the complaint was in three paragraphs. The court says: "The second objection is, that neither paragraph of the complaint shows that the sale of the real estate was perfected by making a contract that would bind both parties in the sale. This was not required by the terms of the contract sued upon, as contained in the first or second paragraphs of the complaint; it might have been a good objection to the third paragraph of the complaint, to which the demurrer was sustained, and, doubtless, for that reason. If the appellee performed on his part all that the contract required him to do, and was prevented from consummating a sale by the act of appellant, that is sufficient."

Unquestionably, the parties have a right to provide in their contract that the agent not only shall find a purchaser, but that he shall procure from such purchaser a valid agreement in writing which will take the contract of sale out of the statute of frauds, and, when this is the arrangement, no commission can be collected until such written agreement to purchase is furnished. But even then the principal may waive it by accepting a purchaser and selling to him, or otherwise: *Mechem on Agency*, 793.

But the agreement here contains no provision that the broker shall procure a written contract from the purchaser, and his undertaking to "sell" does not imply that he is to procure such a written contract.

¹⁶⁶ If the third paragraph of the complaint in *Fischer v. Bell*, 91 Ind. 243, which is relied upon, contained the averment that the broker was to procure a written contract for the sale of the land, a fact which the statement of the case does not disclose, and the pleading did not show that he did procure such written instrument, the lower court doubtless sustained the demurrer to the paragraph for that reason, and this is perhaps all the supreme court meant to indicate by the use of the language above quoted from that case.

The appellant's further contention is, that as the special verdict fails to disclose that the purchaser was financially able to

buy and pay for the land, the judgment cannot be sustained. We do not think this follows.

It is doubtless true that if the purchaser was not able to buy and pay for the land, upon the terms of the contract, the agent could not properly claim to have procured a purchaser. But it is not always necessary that the agent, before he will be entitled to recover, must allege and prove the financial ability of the purchaser, as the same will often be presumed.

The evidence is not in the record, and we cannot say what the testimony was, or whether there was any upon the subject. But it is conclusively shown by the special verdict that the appellant repudiated the contract of sale, not on account of the purchaser's financial inability to comply with the contract, but because his (appellant's) wife was dissatisfied. Besides, if the appellant had desired to raise this question, we think it was incumbent on him to plead it specially, and assume the burden of proving it: *Goss v. Broom*, 31 Minn. 484; *Cook v. Kroemeke*, 4 Daly, 268; *Hart v. Hoffman*, 44 How. Pr. 168.

Moreover, the appellant accepted the offer, and, as in the other instance, his rejection of the contract afterward was not based upon the ground of the purchaser's financial inability.

The further argument is made by appellant, that as the special verdict shows a change in the agreement for the sale ¹⁰⁷ of the land, no commission can be collected, except it be upon quantum meruit.

The terms of the sale, it is true, were somewhat different from the original proposition. They were more favorable to the appellant, and, as he accepted the same, he cannot now be heard to say that the work actually performed by his agent was worth any less than that he employed him to do.

There is nothing in the contention that the special verdict is not sufficiently definite to disclose the terms upon which the purchaser agreed to take the real estate. The terms agreed upon, as found in the special verdict, were two thousand five hundred dollars cash, and the remainder in two payments, within three years. The whole price was ten thousand dollars. It was not important how the two remaining payments were to be divided. If all was to be paid within three years, and these terms were accepted by the appellant, the demands of appellee's agreement were satisfied, and there is no good reason why he should not recover the commission.

The objection to the special verdict cannot be sustained, and

the court correctly rendered judgment thereon in favor of appellee.

The judgment is therefore affirmed.

BROKERS—COMMISSIONS, WHEN EARNED.—A real estate broker performs his duty, and is entitled to his commission, when a purchaser is introduced who is ready, willing, and able to purchase on the terms authorized by the principal, and no binding contract of sale is required, if the principal is in a situation to execute it himself: *Gelatt v. Ridge*, 117 Mo. 553; 38 Am. St. Rep. 683, and note. See, also, the note to *Wilson v. Mason*, 49 Am. St. Rep. 167, and the extended note to *Kalley v. Baker*, 28 Am. St. Rep. 546.

BROKERS—STATUTE OF FRAUDS.—If a contract is of such a character that the vendee may successfully plead the statute of frauds against its performance, then it is not a valid contract entitling the broker to commissions: *Wilson v. Mason*, 158 Ill. 304; 49 Am. St. Rep. 162, and note.

BROKERS—COMMISSIONS—FINANCIAL ABILITY OF PURCHASER.—Before a broker can recover commissions for selling property, it must appear that he procured a purchaser of sufficient pecuniary ability to make a purchase: *Butler v. Baker*, 17 R. L. 582; 33 Am. St. Rep. 897, and note.

BROKERS—COMMISSIONS—RATIFICATION OF CONTRACT.—Though a contract of sale made by a real estate agent varies from the terms of his authority, yet, upon approval and ratification by the principal as made by the agent, it becomes part of the original contract: *Gelatt v. Ridge*, 117 Mo. 553; 38 Am. St. Rep. 683.

BOWELL v. DE WALD.

[2 INDIANA APPEALS, 303.]

INNKEEPERS—LIABILITY.—An innkeeper is prima facie liable for any loss or injury to the goods of his guest, not caused by an act of providence, the public enemy, or the fault of the guest; and the burden of proof is on the innkeeper to exculpate himself by evidence that the loss did not happen through any neglect or fault on his part or that of his servants.

INNKEEPERS—LIABILITY—PLEADING.—An innkeeper is prima facie liable for the loss of the goods of his guest, and, in an action by the latter to recover for such loss, the complaint need not allege negligence on the part of the innkeeper, nor that the guest was without fault.

INNKEEPERS—LIABILITY—NEGLIGENCE OF GUEST.—The failure of a guest to inform an innkeeper, or his servant, that his baggage contains valuables, for the loss of which he seeks to recover, is not negligence on his part.

APPELLATE PRACTICE—MOTION FOR VENIRE DE NOVO is correctly overruled, if the special findings are not ambiguous, uncertain, nor contradictory, and embrace all the issues and are sufficient to sustain the judgment.

APPELLATE PRACTICE.—Admission of evidence alleged as error cannot be considered on appeal, if no ground of objection is stated at the trial.

J. D. McLaren and E. C. Martindale, for the appellant.

J. Morris and J. M. Barrett, for the appellees.

304 ROBINSON, J. The appellees commenced this action against the appellant. The complaint is in one paragraph, and contained the allegations that the appellees composed the firm of George De Wald & Co., engaged in the wholesale dry goods business at Fort Wayne, Indiana; that on the twenty-ninth day of August, 1889, and long prior thereto, the appellant was the keeper of a hotel or inn, known as the Ross House, in the city of Plymouth, in said county of Marshall; that on said twenty-eighth day of August, 1889, Frank A. Caswell, who was then the traveling agent and salesman of the appellees, arrived at said hotel in a carriage shortly before noon, and thereupon registered and became a guest of said hotel, getting his dinner there; that, upon his arrival as aforesaid, he was met at the door by a servant of said appellant, who took from him his traveling bag or satchel, which then contained two hundred and fifty-two dollars in gold and silver coin of the United States, which then belonged to and was the money of the said appellees, the said Caswell having collected the same from their customers on account of money due from them to the appellees; that the appellant, through his said servant, placed said traveling bag or satchel, with the money aforesaid, in the baggage or coat room adjoining the office of said hotel, and kept possession of said traveling bag or satchel till about 5 o'clock of said day, when the said Caswell called for the same, and found that said traveling bag had been opened, and the said money taken or **305** stolen therefrom while in possession of the appellant, and in his hotel as aforesaid, and while he, the said Caswell, was a guest of said hotel; that, by the carelessness and negligence of the appellant, he suffered someone to enter the said baggage or coat room of said hotel, and to open said satchel, and steal and carry away said money of the appellees, who had demanded of the appellant the said sum of money, or its equivalent, which appellant refused to turn over or pay. Wherefore appellees demanded judgment, etc.

The appellant demurred to the complaint for want of facts, which was overruled and exception taken. The appellant then answered by general denial.

The cause was submitted to the court for trial, and at the request of the appellees, made at the proper time, the court found the facts specially, and its conclusion of law thereon, and, as a

conclusion of law under the facts, the finding was in favor of the appellees in the sum of two hundred and fifty-two dollars. Thereupon the appellant filed a motion for a venire de novo, which was overruled and exception taken.

The appellant then filed a motion for a new trial, which was overruled, and exception taken; and then the appellant filed a motion in arrest of judgment, which was overruled, and exception taken. These several motions having been made and disposed of in the order stated, the court rendered judgment in favor of the appellee upon the special finding of facts and conclusions of law thereon. The evidence is in the record.

Under the assignment of errors it is alleged: 1. The court erred in overruling the demurrer to the complaint; 2. The court erred in its conclusions of law; 3. The court erred in overruling appellant's motion for a venire de novo; ³⁰⁸ 4. The court erred in overruling appellant's motion for a new trial; 5. The court erred in overruling appellant's motion in arrest of judgment.

Under the first error assigned, "that the court erred in overruling the demurrer to the complaint," the position is assumed by counsel for the appellant, in argument, that the complaint is based upon the negligence of the appellant, and therefore was defective and insufficient, in failing to aver that the loss occurred without fault or negligence on the part of the appellees or their agent therein named.

There being no statute in this state regulating the liabilities of innkeepers for loss of personal property sustained by their guests while that relation exists, the liability of the appellant in this action, if any, must therefore be governed by the common law.

There is some conflict in the cases as to the extent of liabilities of innkeepers. In some it is held that they are responsible to the same extent as common carriers.

In note 5 to section 472 of Story on Bailments, eighth edition, it is said that some American cases seem to hold that the innkeeper may exonerate himself by positive proof that he was not in any way negligent, citing a number of cases, among which is that of *Laird v. Eichold*, 10 Ind. 212; 71 Am. Dec. 323. That case decides that although an innkeeper is prima facie liable for the loss of the goods of his guest, yet that he may exonerate himself by showing that the loss happened without any fault on his part, and that he exercised the strictest care and diligence: *Baker v. Dessauer*, 49 Ind. 28.

It is said in 11 American and English Encyclopedia of Law,

page 77, paragraph 51: "According to one line of cases, perhaps constituting a majority of the decisions, it is, as before explained, not necessary for the guest to prove negligence to support his action for the loss of his goods against the innkeeper; nor will proof by the innkeeper that he was guilty of no negligence be an excuse for him, unless he brings himself within those cases ³⁰⁷ excepted. But, according to a different line of cases, the prima facie liability of the innkeeper is based on the presumption of his fault or negligence, and that he may exonerate himself by positive proof that he was not in any way negligent. The general rule of diligence, on the part of innkeepers, is that of 'uncommon care,' as Lord Holt has it, or 'the extremest care,' as some of the books have it. But it has been laid down that public utility 'requires that innkeepers be held liable for all losses which might have been prevented by ordinary care.'"

The following cases, decided by the supreme court, have a direct bearing upon this question: *Hill v. Owen*, 5 Blackf. 323; 35 Am. Dec. 124; *Thickstun v. Howard*, 8 Blackf. 535; *Laird v. Eichold*, 10 Ind. 212; 71 Am. Dec. 323; *Baker v. Dessauer*, 49 Ind. 28.

It seems clear that these cases, without conflict, declare the rule of law to be that an innkeeper is prima facie liable for any loss or injury to the goods of his guest, not occasioned by the act of providence, the public enemies, or the fault of the guest, and the prima facie liability is based upon the presumption that the loss or injury arose from the negligence or fault of the innkeeper, but that an innkeeper, being thus prima facie liable, may exculpate himself by proof that the loss did not happen through any neglect or fault on his part, or that of his servants for whom he is responsible. In *Laird v. Eichold*, 10 Ind. 212, 71 Am. Dec. 323, after stating the authorities, the court says: "This, we think, is the correct doctrine, founded on principle, as well as authority. Innkeepers, on grounds of public policy, are held to a strict accountability for the goods of their guests. The interests of the public, we think, are sufficiently subserved by holding the innkeeper prima facie liable for the loss or injury of the goods of his guest; thus throwing the burden of proof upon him, to show that the injury or loss happened without any default on his part, and that he exercised the strictest care and diligence. And it is more in accordance with the ³⁰⁸ principles of natural justice to permit him to exonerate himself by making such proof, than to shut the door against him, and hold him re-

sponsible for an accident happening entirely without his fault, and against which strict care and prudence would not guard."

In *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369, the court says: "The general doctrine deducible from the authorities, ancient and modern, is, that keepers of public inns are bound well and safely to keep the property of the guests accompanying them at the inn; and, in case such property is lost or injured, the innkeeper can only absolve himself from liability by showing that the loss or injury occurred without any fault whatever on his part, or by the fault of the guest, his companions, or servants, or by superior force; and the burden of proof to exonerate the innkeeper is upon him, for in the first instance the law will attribute the loss or injury to his default." There are many other authorities in harmony with this doctrine, but it is unnecessary to cite them.

It was not, therefore, necessary to allege in the complaint carelessness and negligence on the part of the appellant. The complaint was sufficient without this allegation, under the implied and prima facie liability of the appellant, and such seems to have been the view of the court trying the cause.

It was not necessary, as claimed by the appellant, that the complaint should have alleged that the loss occurred without fault or negligence of the appellees, or their agent therein named, or to have contained words to that effect. The demurrer was correctly overruled.

We think facts which imputed fault or contributory negligence to appellees' agent, or that exonerated the appellant from liability, must have been specially pleaded, other than such issuable facts in the complaint as could be controverted under the general denial. On the trial of this cause, however, ²⁰⁰ it seems all of the evidence in the defense was admitted without objection under the general denial.

The next error complained of is, that the court erred in its conclusions of law. The point is made that there is nothing in the special findings of the court imputing negligence to the appellant or his servants; that the finding on this point is a statement of the evidence, and not of fact.

The sixth finding of the court reads as follows: "That on said day said baggageroom was not secured by lock or otherwise, and it was open, and that said baggageroom had two exterior windows facing the rear yard. There was a rear door to the office of the hotel which was about six feet from the door of said baggage-

room; that, on the afternoon of the day said money was taken, said clerk, who was a boy sixteen years of age, was, for a period of several hours, the only person in charge of said office and baggageroom, and he was absent from said office and baggageroom several times during the course of the afternoon in question on the front porch of the hotel, at one time for at least twenty minutes, when he was the only person in charge of said office and baggageroom, and the said baggageroom could have been entered from the door of the rear of said office, when said clerk was on the front porch, without his being able to see the person so entering said baggageroom. Said defendant did not issue any check to said Caswell for his valise. The guests of said hotel were permitted at all times to enter said baggageroom, and on said day there were twenty guests at said hotel, and the traveling bags or valises of those who had such baggage were kept in said baggageroom. Defendant had no safe in his hotel office for keeping money or valuables of his guests, and the said Caswell did not inform said defendant of the contents of his valise."

Under the case of *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369, and *Coskery v. Nagle*, 30 Cent. L. J. 158, the failure of the ³¹⁰ guest to inform the innkeeper or his servant that his valise contained valuables does not constitute negligence.

The sixth finding, taken in connection with the other findings, sustained the conclusions of law. The motion for a venire de novo was correctly overruled. The special findings are not ambiguous, uncertain, or contradictory; they embraced all the issues in the case, and contain facts sufficient, we think, to sustain the judgment.

The first and second cause in the motion for a new trial is based upon the cause that the damages assessed were excessive and too large. The evidence on this point is without conflict, and sustains the finding as to the amount of the judgment.

Another cause in the motion for a new trial, which is urged by the appellant, is the alleged error of the court in permitting William Beck, a witness on behalf of the appellees, to testify as to the amount of money turned over to the appellees by Mr. Caswell, their agent, who is shown by the record to have lost the money which resulted in the commencement of this action. The record upon this evidence presents no question in this court. There was no ground of objection stated to the court as to the admissibility of this evidence.

One other cause in the motion for a new trial is discussed by

the appellant, which is as follows: "That the court erred in the decision that the allegation in plaintiff's complaint, that the loss of the money was caused by the negligence of the defendant, was surplusage, and in deciding that the plaintiff could, and should, recover on his complaint, as upon an implied contract that the defendant would return to Frank Caswell the property described in plaintiff's complaint, plaintiff having elected, by his complaint, to sue in tort for the negligence of, and not in assumpsit upon an implied contract that he would return the property described in the complaint to said Caswell." We cannot determine the theory upon which the court tried the case, except by the record itself, there being no questions presented by ⁸¹¹ exceptions as to any ruling by the court upon the complaint, other than the exception to the ruling on the demurrer. In the expression of our views upon the ruling upon the demurrer, we have stated the opinion we entertain of the law of the case at bar. The court, in the trial of the cause, seems to have proceeded in accordance with our opinion of the law. We think, under the complaint, that the court proceeded correctly, as appears by the record, and under the special findings arrived at the correct conclusion of law.

One other question is discussed by the appellant, viz., that the court erred in overruling the motion in arrest of judgment. The conclusion that we have reached in the case, as expressed in this opinion, sustains the ruling of the court on this motion.

We find no error in the record for which the case should be reversed.

The judgment is affirmed, with costs.

INNKEEPERS—LIABILITY OF.—An innkeeper is liable under the Civil Code of California for the loss of personal property placed by guests under his care, "unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of someone he brought into the inn": *Fay v. Pacific Imp. Co.*, 93 Cal. 253; 27 Am. St. Rep. 198, and note. An innkeeper is liable for goods stolen in his house from a guest, unless stolen by the servant or companion of the guest: *Shultz v. Wall*, 134 Pa. St. 262; 19 Am. St. Rep. 686, and note.

INNKEEPERS—LIABILITY OF—NEGLIGENCE OF GUEST.—Any conduct of a guest contributing to his loss is always a defense in an action against the innkeeper to recover for property lost or stolen in the inn: *Shultz v. Wall*, 134 Pa. St. 262; 19 Am. St. Rep. 686. See, also, the note to *Dunbier v. Day*, 41 Am. Rep. 777, 778.

APPEAL—EVIDENCE—OBJECTION TO, WHEN WAIVED.—A specific objection to the admissibility of evidence not presented to the trial court cannot be presented on appeal: *Cronfeldt v. Arrol*, 50 Minn. 327; 36 Am. St. Rep. 648; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; 36 Am. St. Rep. 248.

COURT v. SNYDER.

[2 INDIANA APPEALS, 440.]

SALES — DEFECTS — WARRANTY.—In executed sales, the buyer takes the thing sold with all defects, if there is neither warranty nor fraud.

WARRANTY.—A sale for a sound price implies no warranty of soundness.

WARRANTY.—Without willful misrepresentation or artful device to disguise the character or conceal defects in a thing sold, the vendee is bound by the contract, even though the vendor gets a decided advantage, and puts off on the vendee a defective article.

SALES—LATENT DEFECTS.—That the seller is aware of a latent defect in an animal sold does not amount to fraud, unless he makes some statement or uses some act or device calculated to deceive the buyer, or to induce him not to make inquiry.

WARRANTY BY AGENT.—A seller is not bound by express warranties made by an auctioneer or other special agent, unless he has specifically authorized such warranty.

SALES — WARRANTY.—In executed sales, without express warranty, no warranty is implied.

J. H. and F. E. Baker, for the appellants.

S. J. North, H. D. Wilson, and W. J. Davis, for the appellee.

440 REINHARD, J. This was an action on a promissory note, brought by the appellee against the appellants.

There was an answer in two paragraphs. The court sustained a demurrer to both paragraphs of the answer, and this ruling is assigned as error.

The note was given as the purchase price of a mare. The answer attempts to set up what the appellants designate as an implied warranty, though we confess it appears to us more as an effort to plead an express warranty.

The averments of the first paragraph of the answer are, that the mare for which the note was given, and which constituted the only consideration for such note, was, at and before the time of the sale thereof, "sick and diseased, and had ⁴⁴¹ the seeds of an internal disease or malady, from which she died in about three months after said sale; that said disease or malady with which said mare was affected was latent, affecting her internal organs and functions, and the same was not discoverable by the utmost care and diligence, and these defendants did not know or suspect the existence of the same at the time of said purchase; that said plaintiff knew of the disease or malady with which said mare was affected before said mare was sold to these defendants, and he purposely concealed the existence thereof from these defend-

ants in order to obtain a sound price for said mare; that the more effectually to sell said mare as sound, he procured and employed an auctioneer to sell said mare at public sale; that said auctioneer had full authority to sell said mare, and he was not instructed by said plaintiff not to warrant the soundness of said mare; that at the time said sale was progressing, and before the purchase was made, these defendants inquired of said auctioneer whether said mare was sound and free from disease, and they were informed by said auctioneer and by another employee of said plaintiff that said mare was sound and free from disease, which information they relied upon as true, and, on the faith thereof, they purchased said mare as sound and free from disease, and for the full value of said mare if she had been sound and free from disease," etc. The second paragraph is in all essentials the same as the first.

Are the facts pleaded sufficient as an answer to the complaint? As a general rule, if there be no express warranty, the law does not imply one. In such cases the rule of caveat emptor is usually applied. This, we say, is the general rule, which is not, however, without its exceptions.

One of the exceptions is in case of fraud. Says Parsons: "It becomes, therefore, important to know what the law means by fraud in this respect, and what it recognizes as such fraud as will prevent the application of the general rule. . . . The weight of authority requires that this should be ⁴⁴² active fraud. The common law does not oblige a seller to disclose all that he knows, which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent, and be safe; but if he be more than silent—if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry—this becomes a fraud of which the law will take cognizance. . . . The seller may let the buyer cheat himself ad libitum, but must not actively assist him in cheating himself": 1 Parsons on Contracts, 578.

The rule is, that where the sale is an executed one, the buyer takes the thing sold with all the defects, if there be neither warranty nor fraud. And the decided weight of authority is also to the effect that a sale for a sound price implies no warranty: 1 Parsons on Contracts, 584, and note r. See, also, *Postel v. Oard*, 1 Ind. App. 252; Benjamin on Sales, sec. 641, et seq; 10 Am. & Eng. Ency. of Law, 133, et seq.

Where there is no willful misrepresentation or artful device to disguise the character or conceal the defects of the thing sold, the vendee is bound by the contract, even though the vendor got a decided advantage in the trade, and put off on the vendee a defective article, such as an unsound horse: *Beninger v. Corwin*, 24 N. J. L. 257. See, also, 5 *Lawson's Rights, Remedies, and Practice*, sec. 2373.

The mere fact that the seller is aware of a latent defect in the animal will not amount to fraud if he fail to disclose it, unless he made some statement, or made use of some act or device, calculated to deceive the buyer, or to induce him not to make inquiry. His mere silence is not such an act as will constitute fraud, and certainly no warranty can be implied therefrom. In such cases, the buyer can always protect himself by inquiry, and by requiring an express warranty. While this rule may, in individual cases, result in hardships, and give designing men an apparent advantage over the unwary, ⁴⁴³ its opposite would lead to endless litigation and injustice: 1 *Parsons on Contracts*, 577.

It was said by Shaw, C. J., in *Matthews v. Bliss*, 22 Pick. 48: "Each may act upon the knowledge which he has, without communicating it. But aliud est tacere, aliud celare. With this advantageous knowledge, if there be studied efforts to prevent the other from coming to the knowledge of the truth, or if there be any, though slight, false and fraudulent suggestion or representation, then the transaction is tainted with turpitude": See, also, *Roseman v. Canovan*, 43 Cal. 110; *Smith v. Countryman*, 80 N. Y. 655.

There must be a suggestion of falsehood, as well as a suppression of the truth: 10 *Am. & Eng. Ency. of Law*, 112. We are not unmindful that there are cases which hold that even mere silence will sometimes taint a transaction with fraud. There are circumstances, indeed, under which it becomes the seller's duty to disclose a latent defect that is unknown to the buyer, even though he is not asked about it, or has said or done nothing to mislead the buyer. But we do not think the facts averred bring this case within the lines of that class of cases.

Just what the circumstances were under which the sale was made, other than that it was at public auction, is not apparent from the answer. It is nowhere averred that the appellee was present at the sale or knew the slightest thing about it, except that he instructed the auctioneer to sell the animal, and did not forbid him to warrant her. If there is any fraud shown, it must

consist in his failure to go to the auction sale and there to make it known that the mare was unsound. But this cannot be so; on the contrary, it is well settled, we think, that he cannot even be bound by express warranties made by the auctioneer, or other special agent, unless he has specifically authorized such warranty: *Richmond etc. Co. v. Farquar*, 8 Blackf. 89; 1 Wait's Actions and Defenses, 478; 1 Am. & Eng. Ency. of Law, 981. This being the law, and the appellants being presumed to ⁴⁴⁴ know the law, we do not see how it was possible for them to be legally defrauded by the acts or statements of the auctioneer or the third party present at the sale. And how the silence of the appellee could have contributed to such result when he is not shown to have been personally present at the sale, or even to have had any communication with appellants upon the subject of the sale, it is not easy to perceive.

Implied warranties arise by operation of law from the facts pleaded. It seems very much to us that it was the theory of the pleader here to set up an express warranty by the auctioneer, rather than to establish an implied warranty by the facts pleaded. But, however that may be, we do not think the facts sufficient in either case. We conclude, therefore, that the court committed no error in sustaining the demurrer to the answer.

Judgment affirmed.

SALES.—NO WARRANTY OF SOUNDNESS IS IMPLIED FROM A SOUND PRICE on an executed sale of a chattel: *Moses v. Mead*, 1 Denio, 378; 43 Am. Dec. 676, and note, with the cases collected; *Eagan v. Call*, 34 Pa. St. 236; 75 Am. Dec. 653; *Weimer v. Clement*, 37 Pa. St. 147; 78 Am. Dec. 411. A sound price requires sound property: *Bulwinkle v. Cramer*, 27 S. C. 376; 13 Am. St. Rep. 645, and note; *Timrod v. Shoolbred*, 1 Bay, 324; 1 Am. Dec. 620, and note.

SALES—LATENT DEFECTS.—When there is no express warranty, and the vendor sells a thing as sound which has a latent defect unknown to him, he is not answerable to the buyer: *Westmoreland v. Dixon*, 4 Hayw. (Tenn.) 223; 9 Am. Dec. 763, and note. On an executed sale of a chattel, if there is no fraud or express warranty, the buyer takes the risk of the quality and condition of the article: *Moses v. Mead*, 1 Denio, 378; 43 Am. Dec. 676, and note; *Weimer v. Clement*, 37 Pa. St. 147; 78 Am. Dec. 411, and note. See, also, the extended note to *Emerson v. Brigham*, 6 Am. Dec. 113. As to whether a seller is bound to disclose defects in an article sold, see the extended note to *Barnard v. Duncan*, 90 Am. Dec. 425.

SALES—WARRANTY BY AGENT.—A purchaser of machinery may recover from the seller for a breach of warranty by the agent of the latter, upon proof of a general custom amongst agents selling such machinery to warranty: *Larson v. Aultman*, 86 Wis. 281; 39 Am. St. Rep. 893, and note.

MOYER v. BUCKS.

[2 INDIANA APPEALS, 571.]

JUDGMENTS VOID FOR WANT OF JURISDICTION.—A personal judgment showing upon its face that the court rendering it had no jurisdiction, either of the person or of the subject matter, is absolutely void.

JUDGMENTS.—NOTICE BY PUBLICATION, made in the absence of any law authorizing it, is the same in effect as no notice, and a judgment based upon it is void.

NOTICE BY PUBLICATION.—A personal judgment rendered against a defendant in a bastardy proceeding, without his having been arrested or taken into custody, and upon whom no process was served except unauthorized notice by publication, is void.

J. D. Gougar and R. P. Davidson, for the appellant.

J. B. Milner and C. E. Lake, for the appellee.

571 REINHARD, J. The appellant is the guardian of his son, **572** Dennis, a minor, who, until the fall of 1887, was a resident of Tippecanoe county, when it is claimed he left the state and became a nonresident. It appears that after Dennis left the state, on January 10, 1888, the appellee instituted bastardy proceedings against him before a justice of the peace. The warrant that was issued for his arrest was returned, "Not found," and the justice proceeded with the trial under the statute. He found that Dennis was the father of the appellee's bastard child, and certified the record to the circuit court, where, on the 18th of May following, an affidavit was filed that the defendant was a resident of the state, but had departed therefrom with the intention of avoiding the service of the process, and that his whereabouts was unknown. Notice by publication having been made, the defendant was defaulted, and a personal judgment rendered against him for five hundred dollars on the 5th of October, 1888.

This action is a suit upon that judgment, and was brought against the appellant, as guardian of said Dennis, to obtain satisfaction of the judgment out of the assets in his hands for said ward. The complaint is in one paragraph.

The appellant demurred to the complaint. The demurrer was overruled, and the appellant answered in four paragraphs, the third and fourth of which set up the facts above stated at length, and with the additional averments that the ward owned no property in the state of Indiana, other than that in the hands of the guardian, which consisted of money, and that no attach-

ment or other proceedings had been instituted against said ward, except the bastardy proceedings referred to. A demurrer was sustained to each of these paragraphs. •

The cause was submitted for trial to the court, and there was a finding in favor of the appellee, upon which, over appellant's motion for a new trial, judgment was rendered.

Errors are assigned: 1. For overruling the demurrer to the complaint; ⁵⁷³ 2. For sustaining the demurrer to the third paragraph of the answer; 3. For sustaining the demurrer to the fourth paragraph of the answer; 4. For overruling the motion for a new trial. The motion for a new trial challenges the sufficiency of the evidence to sustain the finding.

The principal question thus presented by the record is, whether a personal judgment in a bastardy proceeding is, or is not, void, where the record shows, on its face, that the only service had upon the defendant was notice by publication.

The appellee's counsel, in their brief, say: "As we conceive it, the question is, Can a personal judgment be rendered against a citizen of this state who has left the state to avoid the service of process? The affidavit for publication states that Dennis Moyer, the ward, is a resident of the state. The notice treats him as a nonresident; so does the order of court. We submit that the affidavit characterizes the proceedings and is the basis of it, and, under the statute, though the subsequent proceedings are irregular, some notice was given, and it is sufficient."

Looking at the case, then, from the view most favorable to the appellee, the question still remains, may a personal judgment be rendered in a bastardy proceeding against a defendant who has not been arrested or in custody, and upon whom no process has been served, except notice by publication, even though he be a resident of the state, but temporarily absent therefrom? This question, we do not hesitate to say, must be decided adversely to the claims of the appellee.

We are not unmindful of the rule that where notice is given by publication the judgment of the court, that the publication and affidavit upon which it is based are sufficient to give it jurisdiction, is conclusive upon all the parties, as against a collateral attack: *Essig v. Lower*, 120 Ind. 239; *Goodell v. Starr*, 127 Ind. 198. ⁵⁷⁴ But it must be evident that this rule by no means keeps a personal judgment from being void which has been rendered upon no other notice than by publication.

In *Jackson v. State*, 104 Ind. 516, the rule was expressed as follows: "If there be a notice or publication, or whatever of

this nature the law requires in reference to persons or other matters, its sufficiency cannot be questioned collaterally." And further on the court says: "It has long been the rule in this state, that where a court is required to determine whether facts essential to jurisdiction exist, a judgment that they do exist will be conclusive, as against a collateral attack."

But what was it the law required the court to determine in those cases, with reference to the notice? By an examination of those cases, it will be found that the proceedings there were in rem, and no other kind of judgments was sought or obtained. The only fact essential for the court to determine in reference to its jurisdiction was whether the notice and affidavit were sufficient, in order to make valid a judgment in rem. There was no occasion to decide whether such notice and affidavit would have been sufficient to warrant a personal judgment. The point was decided, however, in *Quarl v. Abbett*, 102 Ind. 233; 52 Am. Rep. 662.

Where there is no statute authorizing notice by publication, it is doubtful whether it is good even as the basis of a judgment in rem, and certainly it could not be claimed successfully that it will authorize a personal judgment, in the absence of a special statute to that effect.

Where a personal judgment is sought, it devolves upon the court, as preliminary to the hearing, to determine whether personal service has been had. If it determines this question in the affirmative, and it appears that some personal service was in fact had, the judgment, however irregular or voidable, is not void, and will be sufficient to withstand any collateral attack.

As a general rule, a personal judgment is absolutely void, ⁵⁷⁵ where it appears upon its face that the court had no jurisdiction, either of the person or the subject matter: *Louisville etc. Ry. Co. v. Hubbard*, 116 Ind. 193; *Kingman v. Paulson*, 126 Ind. 507; 22 Am. St. Rep. 611; *Quarl v. Abbett*, 102 Ind. 233; 52 Am. Rep. 662; *Curtis v. Gooding*, 99 Ind. 45.

Ordinarily, in civil actions, where there is no appearance for the defendant, a summons and service thereof is necessary in order to give the court jurisdiction of the person of the defendant so that it may render a personal judgment. While a bastardy proceeding is, in some sense, a civil action, the process required there is a *capias* or warrant: *Morris v. State*, 115 Ind. 282.

Where a defendant in such a proceeding has been once ar-

rested on a warrant, and escapes, and then the cause is certified to the circuit court under the statute, it seems that the trial may proceed in his absence, and he may thereafter be arrested again, and be compelled to comply with the court's orders: *Patterson v. State*, 91 Ind. 364; *Lucas v. Hawkins*, 102 Ind. 64, overruling *Patterson v. Pressley*, 70 Ind. 94.

But we know of no law authorizing any kind of legal proceeding against anyone without some process, and, upon every principle underlying our system of jurisprudence, such a proceeding would be a nullity. In this state, the process required is usually prescribed by the statute.

The pertinent inquiry for us to make, therefore, is, What sort of process has the statute provided in such cases, and has the statutory provision been complied with?

We have already seen that the kind of process which the statute requires is a warrant or *capias*: *Morris v. State*, 115 Ind. 282.

The statute nowhere provides for notice by publication in bastardy cases. Freeman says that "a publication made in the absence of any law authorizing it is the same, in effect, as no publication. A judgment based upon it is void": *Freeman on Judgments*, 127.

But even if this is not so, and even if there were a statute⁵⁷⁶ expressly authorizing notice by publication in bastardy cases, as was once the case, we apprehend such statute would be applicable only to such portion of the proceedings as might be considered strictly in rem. Such notice might be sufficient to authorize the court, in the absence of the defendant, to fix the status of the parties, determine the paternity of the child, etc; but as to that we, of course, decide nothing. The action of the court goes no farther than that. No personal judgment could be rendered on such notice, even if the defendant were a resident of the state and temporarily absent. The statute itself forbids it: *Rev. Stats. 1881*, sec. 390; *Mitchell v. Gray*, 18 Ind. 123; *Sowers v. Edmunds*, 76 Ind. 123; *Middleworth v. McDowell*, 49 Ind. 386; *Lytle v. Lytle*, 48 Ind. 200.

And it has been repeatedly decided that a judgment in rem cannot become the foundation of another action: *Henrie v. Sweasey*, 5 Blackf. 335; *Roose v. McDonald*, 23 Ind. 157; *Lipperd v. Edwards*, 39 Ind. 165.

We are referred to the case of *Davidson v. State*, 62 Ind. 276, as relied upon by the court below to support its decision. In

that case, however, the question of the validity of a personal judgment rendered upon constructive service was not before the court.

There the proceeding had been instituted before a justice of the peace. A warrant had been issued for the defendant and returned, "Not found." The justice proceeded to hear the case in the absence of the defendant, and found that he was the father of the bastard child. He certified the case to the circuit court. At the next term of that court, an affidavit of nonresidence was filed and notice by publication had. At a succeeding term of the court, the cause was tried on default of the defendant, and a finding was made that he was the father of the child; and the cause was continued without fixing the amount the defendant was to pay, or rendering any judgment against said defendant whatever. Shortly afterward a warrant was issued, upon which the defendant ⁵⁷⁷ was arrested and gave bail for his appearance at the next term of court, when he appeared and moved to set aside the default, which motion the court overruled. After a motion in arrest had been made and overruled, the court rendered final judgment on the default and finding previously entered. The only question was, whether the default was legal, for up to that time no judgment had been rendered. The court held that it was, but it was not called upon to decide, and did not decide, that a personal judgment upon such finding alone was valid, because no judgment had been rendered prior to the appearance of the defendant. Possibly the notice of publication might have been sufficient under the statute to authorize the court to proceed in the defendant's absence and determine the status of the parties, but it did not authorize the rendition of any personal judgment, nor did the court so decide. The case is therefore no authority by which we feel bound.

A few other cases of an earlier date would seem to intimate that a defendant in a bastardy proceeding might be properly served with notice by publication: *Melton v. State*, 9 Ind. 452; *Hunter v. State*, 6 Blackf. 383. However, what validity should be given to a personal judgment which has been rendered upon such notice only is not determined by any of those cases, as they turned upon other questions not here involved.

The appellee cites *Beard v. Beard*, 21 Ind. 321, as an authority that a personal judgment on a notice by publication may be rendered against a resident of the state who is temporarily absent. But we do not regard that case as determining the question before us, and, if counsel will examine it carefully, they will find

that the court even there declare that, in the absence of a statute, a constructive service upon a resident of the state while absent is void, and that he should be served by copy of the summons at his last usual place of residence.

578 Whatever the court intimates there as to the power of the legislature to make a law which would make notice by publication effective is without controlling force here, as it has not been attempted to make such a law for such cases as the one we are now considering.

From what has been said, it will be apparent that we regard the rulings of the court as erroneous. There was no legal evidence to sustain its finding and judgment, and the motion for a new trial should have been sustained.

The court erred, also, we think, in sustaining the demurrer to the third and fourth paragraphs of the answer.

Judgment reversed, with instructions to the court below to proceed in accordance with this decision.

JUDGMENTS VOID FOR WANT OF JURISDICTION.—When it appears from the whole record that a court has no jurisdiction over the person or subject matter, the judgment is void: *Hope v. Blair*, 105 Mo. 85; 24 Am. St. Rep. 366, and note; *Ferguson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808, and note in which the cases are collected. See, also, the extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 104.

JUDGMENTS—JURISDICTION—SERVICE OF PROCESS.—If the proof of service of process is not made as required by law, the court acquires no jurisdiction over the person of the defendant, and has no authority to render judgment against him: *Reinhart v. Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52, and note. Absence of legal service or authorized appearance is jurisdictional, and without jurisdiction no judgment can be entered under which rights can be acquired or lost: *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204, and note.

CHICAGO, ST. LOUIS & PITTSBURGH RAILROAD COMPANY v. GRAHAM.

[3 INDIANA APPEALS, 28.]

RAILROADS—RULES AND REGULATIONS.—While a railroad company may adopt reasonable rules and regulations in the dispatch of its business in carrying passengers, and insist upon a compliance therewith upon the part of all who seek transportation, it is bound to afford reasonable facilities to enable a passenger to comply with its rules and regulations.

BUYING TICKETS ABOARD THE TRAIN.—A railroad company may charge one who pays his fare on the train a higher rate of fare than one who buys a ticket before getting on the cars, if it extends ample facilities to all travelers who desire to procure tickets.

EXCURSION TRAINS AT REDUCED RATES.—A railroad company may run an excursion train at reduced rates, require passengers to purchase tickets as a condition to obtaining the benefit of such rates, and enforce the rule against all who, by their own fault, fail to comply with it.

RIGHT TO PAY EXCURSION TICKET FARE ON TRAIN.—If a passenger on a railroad excursion train, through the fault of the company, has been unable to procure a ticket before entering the train, he may ride on such train, and, upon a tender of the excursion ticket fare, he is entitled to all the rights and privileges that a ticket would afford to him.

PAYMENT OF EXCESSIVE FARE ON EXCURSION TRAIN.—One is under no obligation to purchase, even for a trifle, what is already his own. Therefore, a passenger on an excursion train, running at reduced rates, who has, through the fault of the company, been unable to secure an excursion ticket, is under no obligation to pay the full or excessive rate of fare demanded by the conductor on the train, in order to prevent his being ejected from the train and thus lessen his damages.

EJECTING PASSENGER—ACTION FOR VIOLATION OF PERSONAL RIGHT.—A cause of action for ejecting a passenger from an excursion train after tender of the excursion rate is not for a breach of the contract to carry, but for the violation of a personal right assured by the law.

EXCURSION TRAIN—LIABILITY FOR EJECTING PASSENGER UNABLE TO PROCURE A TICKET.—When a railroad company invites the public to take passage upon a special train at a certain station, at excursion rates, passengers have a right to expect that reasonable accommodations will be furnished there, or on the train, to obtain tickets; and if the company has no ticket office, or agent, to sell tickets at that station, it cannot insist that all who board the train shall first purchase excursion tickets. Under such circumstances, if it ejects a passenger who tenders the excursion rate on the train, it is liable in tort for the damages inflicted.

EJECTING PASSENGER ON SUNDAY.—The fact that a passenger traveling on a Sunday excursion train is wrongfully ejected on that day from the train, does not bar his right to recover damages for injuries sustained thereby.

J. H. Mellett, C. H. Burchenal, and J. L. Rupe, for the appellant.

C. S. Hernley, for the appellee.

CRUMPACKER, J. Graham sued the railroad company for damages for unlawfully ejecting him from one of its passenger trains.

The complaint alleges that the company ran an excursion train from the city of Indianapolis to the city of Richmond and return on the twelfth day of May, 1889, and prior thereto it advertised such excursion train along the line of its road by "posters," giving the time of its arrival and departure at the various stations, and stating the fare for the round trip; that

said company so advertised said train to leave the station at the village of Ogden at — o'clock A. M. on said twelfth day of May, and that the fare for the round trip from ³⁰ said station would be seventy cents; that plaintiff desired to go on said excursion, and went to the station at Ogden in proper time to take passage on said train, and before the arrival of the train he undertook to procure a round-trip excursion ticket, but could not, for the reason that the company had negligently failed to have any tickets for sale at said station; that said train stopped at said station for the purpose of receiving passengers, and plaintiff, being unable to purchase a ticket, and having the money to pay his fare, embarked upon said train, supposing he could buy a ticket from the conductor; that thereafter the conductor in charge of said train came to plaintiff to collect his fare, and he paid said conductor the sum of ninety-five cents, and "demanded that he be carried from said station, Ogden, to the city of Richmond and return; that said defendant accepted said sum of money for such fare, and gave the plaintiff a receipt therefor"; that upon the return of said train in the evening of said day, the plaintiff took passage thereon for Ogden, and the same conductor was in charge of the train to whom plaintiff paid his fare on the trip to Richmond; that while said train was proceeding on its journey, and was about a mile west of the city of Richmond, said conductor came to the plaintiff and demanded his fare to Ogden, whereupon plaintiff exhibited to him the receipt for the fare paid as aforesaid, and refused to pay any more, and the conductor thereupon stopped said train and unlawfully expelled plaintiff therefrom; that it was dark and raining, and plaintiff was unacquainted in that vicinity, and was compelled to, and did, walk to his home, a distance of thirty-five miles, whereby he was damaged, etc.

A demurrer filed to the complaint was overruled, and exceptions saved. The defendant answered in three paragraphs. The third paragraph was adjudged insufficient upon demurrer. The plaintiff replied by general denial, and the issues thus formed were tried by a jury, who returned a special verdict. ³¹ The defendant moved, successively, for a venire de novo and for a new trial; but both motions were overruled, and the plaintiff was awarded judgment upon the verdict.

The first question for consideration arises upon the ruling of the court upon the demurrer to the complaint.

It is claimed, on behalf of the company, that the theory of the complaint is the breach of a special contract between the appellee and the conductor, by the terms of which the former was to be

carried to Richmond and return for ninety-five cents, and it is insisted that the facts alleged do not establish such a contract. We do not so understand the complaint. It proceeds upon the theory that the company undertook to run a special train at special rates, and that all who complied with the company's regulations were entitled to the benefit of such special rates; and that the appellee complied with such regulations as far as it was in his power to do, and paid the stated fare, and more, and, while in the enjoyment of a privilege he had so purchased and paid for, he was unlawfully expelled from the train. It does not appear by the complaint that it was necessary to have a ticket to obtain the benefit of the excursion privileges; but, conceding that such was the requirement, the complaint is sufficient.

It is universally admitted that a carrier of passengers may adopt reasonable rules and regulations in the dispatch of its business, and may rightfully insist upon a compliance therewith upon the part of all who seek transportation; but the carrier is bound to afford reasonable facilities to enable a compliance with its rules and regulations. A railroad company may charge a higher rate of fare to one who pays the conductor, or manager of a train, than to one who buys a ticket, provided it extends ample facilities to all travelers who desire to procure tickets. Such company may run an excursion train at reduced rates, and require passengers to purchase tickets as a condition upon which they shall obtain the ³² benefit of such rates; and it may enforce this rule against all who, by their own fault, fail to comply with it.

If, however, a passenger is unable to procure a ticket through the fault of the company, he may take passage on such train, and, upon a tender of the ticket fare, will be entitled to all of the rights and privileges that a ticket would afford him. Upon a tender of fare under such circumstances, the relation of carrier and passenger would obtain, and the company would have no right to eject such passenger, or deny him passage, because he is without a ticket. This principle is firmly settled by the decisions of the supreme court of this state: *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; 92 Am. Dec. 276; *St. Louis etc. Ry. Co. v. Myrtle*, 51 Ind. 566; *Toledo etc. Ry. Co. v. McDonough*, 53 Ind. 289; *Lake Erie etc. Ry. Co. v. Fix*, 88 Ind. 381; 45 Am. Rep. 464; *Godfrey v. Ohio etc. Ry. Co.*, 116 Ind. 30; *Pennsylvania Co. v. Bray*, 125 Ind. 229.

The fact that the trespass occurred on Sunday does not affect the appellee's right to recover.

While the right to ride upon the train had its foundation in the implied agreement upon the part of the company to carry the appellee, created by the payment of fare, the action is not for the breach of such contract, but for the violation of a personal right assured by the law. As between carrier and passenger, the law imposes a duty upon the carrier independent, in a sense, of their contractual relations, although incidental thereto, but which has its basis in the regard the law has for human life, and personal security: *Louisville etc. Ry. Co. v. Frawley*, 110 Ind. 18; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221.

It is further contended that it was the appellee's duty to pay the return fare demanded by the conductor out of consideration for the rights of other travelers, and that his only right of action would be to recover from the company the excess charged. If he had paid the extra demand, and been carried to his destination, perhaps he could only recover the excess, unless some element of special damages entered into ³³ the occurrence; but he was not bound to do this. This identical question was before the court in *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1, 92 Am. Dec. 276, and, in deciding it, the court said: "The plaintiff was under no obligation to purchase, even for a trifle, the right which was already his own."

The complaint is sufficient. The third paragraph of answer pleads a rule of the company requiring passengers to purchase tickets in order to obtain the benefit of the excursion rates, and alleges that the company had ceased to keep a ticket-office at Ogden on account of a lack of business to justify it, which fact was generally known in that vicinity; and that appellee boarded the train without a ticket and the conductor demanded of him the regular cash fare, which he refused to pay, and was, on that account, required to leave the train; that no unnecessary force was employed to expel him, nor was he subjected to any indignity.

There was no error in rejecting this answer. It was immaterial whether the company maintained a regular ticket-office at Ogden or not. When it invited the public to take passage upon the special train at that point, and agreed to carry for a special rate, passengers had a right to expect that reasonable accommodations would be furnished there, or on the train, to obtain tickets.

As has been suggested, it is only where he is without a ticket through his own fault that a cash passenger may be discriminated against.

It is argued that the special verdict is defective, in that it does not find the terms of the special contract between the appellee and the conductor, nor set out the substance of the cash fare receipt, nor find what the company's regulations were respecting the purchase of tickets for the excursion.

None of these questions were material. The action is not founded upon any special contract with the conductor, and the receipt was only evidence of the payment of fare, and ³⁴ could have no possible effect upon the rights of the parties to any further extent. It was immaterial, under the theory of the case, what the company's rules were, with reference to requiring passengers to purchase tickets. The fact that appellee paid more than the advertised fare should subject him to no disadvantage.

Every essential issue was covered by the special verdict, and the appellee was entitled to judgment thereon. There is no material error in the record.

The judgment is affirmed.

RAILROADS—RULES AND REGULATIONS—TICKETS—EX-PULSION.—A railroad company may prescribe a rule requiring all persons, before taking passage on its passenger trains, to procure tickets, and to exhibit them to the conductor at all proper times to entitle them to ride, and, in default thereof, to pay an additional sum, when it has furnished the necessary conveniences and facilities to travelers for procuring tickets. If the company has failed or neglected to furnish a traveler an opportunity to procure a ticket, and he applies for passage or enters its passenger train without having such ticket, but offers to pay the usual fare, the company cannot lawfully reject or eject him, as the company is bound to furnish all the conveniences, opportunity, and means necessary to comply with its rules: *Poole v. Northern Pac. R. R. Co.*, 16 Or. 261; 8 Am. St. Rep. 289; *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133; *Evans v. Memphis etc. R. R. Co.*, 56 Ala. 246; 28 Am. Rep. 771; *McGowen v. Morgans' R. R. etc. Co.*, 41 La. Ann. 732; 17 Am. St. Rep. 415; *Reese v. Pennsylvania R. R. Co.*, 131 Pa. St. 422; 17 Am. St. Rep. 818. A passenger, unable to purchase a ticket because of the failure of a railroad company to furnish him an opportunity to do so, may pay the excess demanded on the train under protest, and recover it by suit, or refuse to pay it, and hold the company liable in damages for an ejection: *Forsee v. Alabama etc. R. R. Co.*, 63 Miss. 66; 56 Am. Rep. 801; *St. Louis etc. R. R. Co. v. South*, 43 Ill. 176; 92 Am. Dec. 103. A railway company may lawfully make and enforce a rule that passengers not procuring tickets before entering a train shall pay a greater specified rate of fare, if it, when added to the regular rate, does not exceed the maximum charge allowed by law: *Zagelmeyer v. Cincinnati etc. R. R. Co.*, 102 Mich. 214; 47 Am. St. Rep. 514, and note; *Reese v. Pennsylvania R. R. Co.*, 131 Pa. St. 422; 17 Am. St. Rep. 818. See monographic note to *Commonwealth v. Power*, 41 Am. Dec. 483, on regulations which railroad companies may make respecting passengers and others not employees. A railroad company is required to furnish a convenient and accessible place for the sale of tickets, and to afford the public a reasonable opportunity to purchase them. Its right to discriminate in its fare between those who purchase tickets and those who do not, while just and reasonable, is dependent on the fact that a reasonable opportunity has been given to obtain tickets at the lowest rate of fare: *St. Louis etc. R. R. Co. v.*

South, 43 Ill. 176; 92 Am. Dec. 103. An action of tort will lie to recover damages for the wrongful expulsion of a passenger from a railway car, and though the complaint alleges a contract for carriage, the action is not for breach of the contract, but for tort by breach of duty: *Gorman v. Southern Pac. Co.*, 97 Cal. 1; 33 Am. St. Rep. 157. The plaintiff, in such an action, may recover more than nominal damages, although he has received no personal injuries to his body by reason of such expulsion, and has suffered no pecuniary loss: *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133; but ordinarily the measure of damages is the cost of a ticket from the point of expulsion to the passenger's destination, together with an allowance for such damages as actually result from loss of time: *Gorman v. Southern Pac. Co.*, 97 Cal. 1; 33 Am. St. Rep. 157. In an action by a passenger against a carrier, to recover damages for injuries received through its carelessness, the fact that the plaintiff was, at the time of the injury, traveling on Sunday, in violation of a statute of the state, is no defense to the action: *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221.

GARRIGUS v. HOME FRONTIER AND FOREIGN MISSIONARY SOCIETY.

[3 INDIANA APPEALS, 91.]

NEGOTIABLE INSTRUMENTS—NOTE OR WILL.—A written instrument in which the maker expresses a desire "to advance the cause of missions, and to induce others to contribute to that purpose," and promises, absolutely and unconditionally, to pay a certain sum of money, the payment to be made out of his estate one month after his death, is a promissory note, and not a will, and, having a good and valid consideration, it may be enforced by suit.

DEATH.—A promissory note payable after the death of the maker is a valid obligation.

DELIVERY.—The payee's possession of a promissory note raises a presumption of delivery.

EXECUTORS AND ADMINISTRATORS—CLAIM AGAINST ESTATE.—It is sufficient to file a note, executed by one deceased, against his estate, without accompanying the same with a formal complaint.

M. Garrigus, M. Bell, and W. C. Purdum, for the appellant.

J. C. Blacklidge, W. E. Blacklidge, C. C. Shirley, and B. C. Moon, for the appellee.

⁹¹ NEW, C. J. The appellee, as plaintiff, filed a claim against ⁹² the estate of Elizabeth Stover, the appellant's decedent, founded upon the following written instrument:

"November 10th, 1884.

"Desiring to advance the cause of missions, and to induce others to contribute to that purpose, I promise to pay to the order of the 'Home Frontier and Foreign Missionary Society of the Church of the United Brethren in Christ,' the sum of

six hundred (\$600) dollars, with interest from —, at the rate of — per cent per annum. Said sum and interest to be paid out of my estate one month after my death.

her
"MRS. ELIZABETH X STOVER.
mark

"Executed in our presence:

"W. S. Fields.

"Amelia Jolon."

A demurrer to the claim for want of facts was overruled, and exception taken. There was a trial by the court, with finding and judgment for the appellee in the sum of eight hundred and four dollars.

The errors assigned by the appellant are, that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the appellant's motion for a new trial.

The first objection urged to the complaint is, that the instrument sued on is without sufficient consideration to support it, and that, therefore, the action cannot be maintained.

The promissory note sued on, for such we think it must be regarded, was executed "to advance the cause of missions, and to induce others to contribute to that purpose."

We are referred by counsel for the appellant to cases which would seem to hold that a promise, such as that made by the decedent in the case at bar, however worthy the object intended to be promoted, is gratuitous, and cannot be enforced; that the appellant, as the personal representative of the promisor, may refuse to perform the promise, although his refusal may disappoint reasonable expectations, and may not be justified in the forum of conscience.

§§ The promise of the decedent, under the decisions of this state, cannot be held to be void for want of consideration.

The case of *Johnston v. Wabash College*, 2 Ind. 555, was an action for debt upon the following promissory note:

\$50.

Warren County, March 5th, 1842.

"For value received, I promise to pay Wabash Manual Labor College and Teachers' Seminary fifty dollars, five years from date, with interest payable annually on the first day of February.

(Signed) "JAMES JOHNSTON."

The only objection made to the recovery on the note was, that it was given without consideration. The court held that the accomplishment of the object in aid of which the money was

promised formed a good and valid consideration for the promise to pay it.

The case of *Roche v. Roanoke Classical Seminary*, 56 Ind. 198, was a claim filed against the appellant's decedent, founded upon a written obligation in these words:

"March 1st, 1873.

"For value received, I promise to pay to the order of the trustees of Roanoke Classical Seminary, of the United Brethren in Christ, at Roanoke, Indiana, as endowment fund, the interest annually, at six per cent, on the sum of one hundred dollars, for such a term of years as will be required for said interest to equal the principal. And should such interest not be paid, as aforesaid, then the principal itself shall be at once collectible, otherwise never. Without any relief from valuation or appraisement laws.

(Signed) "ELAM A. MAHON."

The second paragraph of the answer was a plea of failure of consideration, to wit: That said note was signed as a subscription to an endowment fund of the appellee, then and there being subscribed to; that said endowment fund was to be the sum of thirty thousand dollars, and no other sum, and that said sum had not yet been raised or subscribed, etc.

The court, in ruling upon the sufficiency of this paragraph of the answer, say, among other things: "The truth is, ²⁴ that the note sued on required no consideration to support it other than 'the accomplishment of the object in aid of which the money was promised.' The appellee was authorized by law to accept donations, and appellant's decedent, in his lifetime, had the right to make such a donation. And having made the contract in suit, neither he nor his administrator can escape or avoid the obligation, upon the plea that it was without consideration, or that its consideration had wholly failed. The contract of the decedent was in writing and must speak for itself, without regard to matters not mentioned therein. It was not a promise to pay a sum certain as a part of any other sum, or upon condition that a certain sum should be donated or subscribed by others to the fund mentioned in the note. It was the absolute and unconditional promise of the maker of the note, not dependent by its terms upon the acts of any other man or body of men, to pay as therein stipulated, for the purpose therein expressed. And, in our opinion, the only matters which could have been answered in this action, to constitute a failure of consideration of the note in suit, would have been an alleged abandonment by the appellee

of the enterprise for which it was incorporated, and in aid of which the note was executed."

The cases, in some of the other states, holding to a different doctrine will, as a rule, be found to have adopted the reasoning of the court in the case of *Trustees v. Stewart*, 1 N. Y. 581, a case which the supreme court of this state has refused to follow, and has held to be at variance with the weight of authority: See *Higert v. Trustees*, 53 Ind. 326; *Northwestern Conference v. Myers*, 36 Ind. 375; *Pierce v. Ruley*, 5 Ind. 69; *Jewett v. Salisbury*, 16 Ind. 370; *Leviston v. Junction R. R. Co.*, 7 Ind. 597; *Mansur v. Indianapolis etc. Ry. Co.*, 8 Ind. 487; *Musselman v. Cravens*, 47 Ind. 1; *Petty v. Trustees*, 95 Ind. 278; *Bryan v. Watson*, 127 Ind. 42.

It is further urged against the sufficiency of the complaint ⁹⁵ that the written instrument which is therein declared upon was simply an attempt, by the decedent, to dispose of that amount of his estate after his death, was therefore testamentary in its character, and without legal efficacy as executed.

We cannot adopt that view. The instrument in no respect resembles a will. It does not attempt a testamentary disposal of property, but promises expressly to pay a sum of money to a party named, and, being in the form of a contract to pay money, may be said to import a consideration.

It is none the less a promissory note because made payable after the death of the maker: *Story on Promissory Notes*, sec. 27; 1 *Daniell on Negotiable Instruments*, sec. 46; *Hathaway v. Roll*, 81 Ind. 567; *Price v. Jones*, 105 Ind. 543; 55 *Am. Rep.* 230; *Wolfe v. Wilsey*, 2 Ind. App. 549.

In the case of *Moore v. Stephens*, 97 Ind. 271, relied on by the appellant's counsel, there was no promise to pay. There the decedent, in the instrument sued on, simply directed that at his death his estate should pay a certain sum of money to the beneficiary therein named.

It is further objected to the complaint that it is not shown that the note went into the possession of the appellee before the decedent's death.

It is sufficient to file a note executed by one deceased, against his estate, without accompanying the same with a formal complaint: *Pulley v. Perfect*, 30 Ind. 379; *Smith v. Denman*, 48 Ind. 65; *Noble v. McGinnis*, 55 Ind. 528; *Hathaway v. Roll*, 81 Ind. 567; *Price v. Jones*, 105 Ind. 543; 55 *Am. Rep.* 230; *Wolfe v. Wilsey*, 2 Ind. App. 549.

The possession of a note will raise a presumption of delivery:

Bush v. Seaton, 4 Ind. 522; **Kimball v. Whitney**, 15 Ind. 280; **Stewart v. Davis**, 18 Ind. 74; **Paulman v. Claycomb**, 75 Ind. 64.

The demurrer to the complaint was properly overruled. We have carefully examined the evidence, and do not think the trial court erred in overruling the motion of the appellant for a new trial. The signature of the decedent to ⁹⁸ the note sued on was proven, and the finding of the court was, in all respects, sustained by the evidence.

The judgment is affirmed, with costs.

NEGOTIABLE INSTRUMENTS.—A promissory note, although by its terms payable after the death of the maker, is a valid instrument, where it contains a promise to pay a sum certain at a specified time after his death: **Carnwright v. Gray**, 127 N. Y. 92; 24 Am. St. Rep. 424. In determining whether an instrument, posthumous in its operation, is a will or not, the intention of the maker, to be gathered from the language and the attendant circumstances, should control: **Hazleton v. Reed**, 46 Kan. 73; 26 Am. St. Rep. 86, and note, showing when an instrument is a will or a deed. An instrument in the form of a note, but payable "after my decease, on demand," is a note: **Note to Carlton v. Cameron**, 38 Am. Rep. 622. The possession of a note is prima facie evidence of its ownership and right to sue: **Bigelow v. Burnham**, 90 Iowa, 300; 48 Am. St. Rep. 442; notes to Market etc. **Nat. Bank v. Sargent**, 85 Me. 349; 35 Am. St. Rep. 376; **Carnwright v. Gray**, 24 Am. St. Rep. 428.

EXECUTORS AND ADMINISTRATORS.—THE PRESENTATION OF A CLAIM against a decedent's estate need not be in any particular form, but only so as to give notice of its character and amount, and enable the executor to provide for its payment: **Henderson v. Isley**, 11 Smedes & M. 9; 49 Am. Dec. 41.

ADAMS v. MAIN.

[3 INDIANA APPEALS, 232.]

HUSBAND AND WIFE.—AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS may be maintained without proof of adultery. Such an action, whether adultery is charged or not, is an action for seduction, and the wife is, under the statute, incompetent as a witness in such cases.

AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS is based on the loss of the consortium, and proof of actual pecuniary loss is not essential to recovery.

WITNESSES.—IN AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS, it is improper to ask the husband, on his cross-examination as a witness, after he has testified in chief that he witnessed certain acts and conduct between his wife and the defendant, whether he inferred adultery from such acts and conduct, as this calls for the statement of a conclusion, and not a fact.

EVIDENCE.—IN AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS, it is harmless error, if any, to permit the husband, who is plaintiff, to ask a witness if she had ever heard the

neighbors talk about his wife and the defendant going to a show, if a negative reply is given.

EVIDENCE.—IN AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS, after the husband, who is plaintiff, has shown that, while the children were sick, their mother left them, and accompanied the defendant to places of amusement, it is proper to exclude testimony of a general character as to how the plaintiff's wife treated her children.

INSTRUCTIONS.—IN AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS, it is not error to charge the jury that no inference is to be drawn for or against either party from the fact that the wife has not testified. She is, under the statute, incompetent as a witness in such an action.

INSTRUCTIONS.—IN AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS, where the husband is plaintiff, it is not error to charge the jury that he cannot recover if the defendant made presents to her, and gave her other attentions, with the consent of the husband, the defendant having no evil intent, and not having had carnal knowledge of her, although she conceived a fondness for him, as a consequence of such acts.

INSTRUCTIONS—APPEAL.—No ground is presented for review on appeal, because of the refusal to give instructions requested, if it appears that they were not asked until after the commencement of the argument.

APPEAL.—IT WILL BE PRESUMED, on appeal, that a ruling of the trial court sustaining an objection to a question asked a witness was correct, in the absence of any showing to the contrary.

PLEADINGS—AMENDMENTS AND ADDITIONS TO.—It is very largely within the discretion of the trial court to permit the filing of additional paragraphs of pleadings and amendments after the issues are closed; and a ruling allowing this to be done is not ground for a reversal of judgment, unless the appellant shows affirmatively that he was prejudiced by it.

TRIAL—VENIRE DE NOVO.—The failure of the jury to find upon all the issues is not a defect appearing upon the face of the verdict for which a venire de novo will be awarded.

RES JUDICATA.—THE FINDING OF THE JURY UPON ONE PARAGRAPH ONLY of the complaint, where there is evidence tending to support another paragraph, precludes an action on the cause averred in the paragraph as to which no finding was made.

M. P. Turner and M. E. Forkner, for the appellant.

J. M. Morris and C. S. Hernly, for the appellee.

REINHARD, J. The appellee sued the appellant for debauching his wife. Originally, the complaint was in one paragraph, and in it there was a charge of adultery.

After the issues had been closed and the trial entered upon, the appellee, by leave of court, filed a second paragraph of complaint, from which the charge of carnal knowledge was omitted, and which declared simply upon an alienation, by the appellant, of the affections of the appellee's wife. No demurrer was filed to either paragraph.

²³⁴ Issues were joined, the cause was tried by a jury, and there was a verdict in favor of the appellee on the second, or additional, paragraph of the complaint, there being no express finding on the first.

The appellant made unsuccessful motions for a venire de novo and for a new trial, and the ruling of the court upon these motions is reserved by proper exceptions, as also by the assignment of errors.

The appellant requested the court to instruct the jury that the action could not be maintained without proof of adultery. The instruction was refused. The record shows, and the appellant concedes, that the request was not made until after the commencement of the argument, and the question of whether or not there was error in refusing to give the instruction is, therefore, not properly presented. The point is made, however, upon the sufficiency of the evidence to sustain the verdict, and, in the discussion of this question, the appellant's counsel urge upon us with much earnestness the consideration that sexual connection must be established before there could be any recovery.

As the finding was expressly upon the second paragraph of the complaint, in which the charge is confined to that of alienating the affections of the wife from her husband, and as there was neither demurrer nor motion in arrest of judgment, and there is no assignment of error that the complaint fails to state facts sufficient to constitute a cause of action, we do not see how the appellant is in any position to present the question he asks us to decide. The point has been decided, however, against the appellant in *Higham v. Vanosdol*, 101 Ind. 160.

The appellant next insists that the gist of the second paragraph of the complaint is for the loss of services, and, as there was no proof of any actual pecuniary loss, the evidence did not sustain the averments in this paragraph. In this view we cannot concur. It is, perhaps, true that the theory of such an action was originally the loss of services, for it ²³⁵ was presumed that by the seduction or alienation the wife's services were rendered less valuable. But, whatever may have been the principle, originally, upon which this class of actions was maintainable, it is certain that the weight of modern authority bases the action on the loss of the consortium—that is, the society, companionship, conjugal affections, fellowship, and assistance. The suit is not regarded in the nature of an action by a master for the loss of the services of his servant, and it is not necessary that there should be any pecuniary loss whatever: *Rinehart v. Bills*,

82 Mo. 534; 52 Am. Rep. 385; Bigaouette v. Paulet, 134 Mass. 123; 45 Am. Rep. 307; Sikes v. Tippins, 85 Ga. 231; Heermance v. James, 47 Barb. 120; Jones v. Utica etc. R. R. Co., 40 Hun, 349; Cooley on Torts, 2d ed., 261; Bigelow on Torts, 328, 333-340.

It is true that the loss of services may still constitute one of the elements of damages in the case, for the alienation of the wife's affections may involve the loss of such services, but not necessarily so. Mr. Bishop states the law upon this subject as follows: "One who, by improper means, alienates a wife's affections from her husband, *though she neither leaves him nor yields her person to the seducer* [the italics are ours], injures the husband in that to which he is entitled, brings unhappiness to the domestic hearth, renders her mere services less efficient and valuable, and inflicts on him a damage in the nature of slander; so that for the redress of his wrong an action is maintainable": 1 Bishop on Marriage and Divorce, new ed., sec. 1361.

As an evidence that, whatever may have been the rule formerly, the trend of authority now is to treat the consortium as the basis of the action, it may be said that in many jurisdictions of this country, including our own, it is now held that the wife may maintain an action for the alienation of the affections of her husband, and that this may be done even in some jurisdictions where the common law still prevails: 1 Bishop on Marriage and Divorce, new ed., sec. 1357 et seq; Haynes ²³⁶ v. Nowlin, 129 Ind. 581; 28 Am. St. Rep. 213; Postlewaite v. Postlewaite, 1 Ind. App. 473.

The reasoning in these cases is, that inasmuch as the husband has the right to sue for the loss of the consortium of the wife, there can be no intelligent reason why she should not possess the right to sue for the loss of the society, companionship, affection, and protection of the husband, which the law has vouchsafed to her. Surely, the analogy would not hold good if the right of action of the husband for the alienation of the affections of his wife were based solely upon the loss of her services, for, under the common law, the wife, who was considered the inferior being, had no property rights in the services of the husband: 3 Blackstone's Commentaries, 143.

But, even if we were to concede that the husband's right to maintain this action is based upon the loss of services of the wife, as the appellant contends, it does not necessarily follow, by any means, that there must have been actual separation of the parties, for, as we have seen from the quotation from Bishop,

one of the very consequences of the loss of the affections is, that it lessens the value and efficiency of her services, even if she continues to perform them. It seems plain, therefore, that, if it can be shown that the defendant did that which impaired the value of such services, he would still be liable, even though he did not deprive the husband of them entirely. The position of the appellant on this point is, therefore, not maintainable, even from his own premises. The facts proved amply sustain the averments of this paragraph. Error is claimed, also, in the giving of two instructions. The first of these is as follows: "5. This being an action by a husband for the seduction of his wife, the wife is excluded from testifying, and is not a competent witness, and no inference is to be drawn for or against either party to this suit from the fact that the plaintiff's wife has not testified."

²³⁷ Section 501 of the statutes provides that the husband shall be a competent witness in a suit for the seduction of his wife, but she shall not be competent.

The contention of counsel for appellant that the second paragraph of the complaint, upon which the verdict was predicated, does not make a case of seduction cannot prevail. The term "seduction" does not necessarily imply carnal knowledge, although it is generally used in that connection. It was doubtless the intention of the framers of this section to apply that term to all cases of this class, whether there is a charge of adultery or not, and to render the wife incompetent as a witness in such cases. That these cases all fall under the head of seduction is very clearly stated in the following quotation from Bishop: "The husband being entitled to the society and services of the wife, it follows, *from the doctrine of seduction*, that he may recover his damages against anyone who unlawfully entices her away, though *nothing transpires or is meant in the nature of criminal conversation*" (the italics are our own): 1 Bishop on Marriage and Divorce, new ed., sec. 1360. See Higham v. Vanosdol, 101 Ind. 160. We think the instruction was proper.

The other instruction complained of is this: "8. If the defendant made presents to plaintiff's wife, and gave her other attentions, by and with the consent of the plaintiff, with no evil intent, and not intending to alienate her or her affections from him, and never had carnal knowledge of her, the plaintiff cannot recover, even though, as a consequence of such acts, she conceived a fondness and affection for the defendant."

The objection to this charge is pointed out in the brief of appellant's counsel as follows: "It makes the nonliability of the defendant depend upon the question whether the good faith acts of the defendant were done with or without the consent of the plaintiff."

We confess our inability to see the force of this argument. ²³⁹ It is true, the instruction bases the nonliability of the appellant upon the hypothesis of consent. But it does not say, nor can it be inferred from the charge that if he had not consented, he would be liable. Whether, if there was no consent, there would not be a liability, the court does not inform the jury. It states the law correctly as far as it goes, and upon the hypothesis assumed. It is applicable to the facts in dispute.

If the appellant desired an instruction upon any other hypothesis, he should have requested it of the court. Having failed to do this, he cannot complain that the court did not give it of its own motion.

The appellant's attorney, upon cross-examination, asked the appellee the following question: "Do you mean to say to this jury that your wife and that man committed adultery there that evening?" To this question the court sustained an objection made by the appellee, and the appellant claims that the ruling was erroneous.

The plaintiff had testified, in chief, that he had witnessed certain acts and conduct between his wife and the appellant. The question required him to say whether, from those acts and that conduct, he inferred adultery. The question was clearly improper. It required the witness to state a conclusion, and not a fact. Whether or not the acts were such as justified the inference that adultery was committed was for the jury, and not for the witness, to decide.

Over the appellant's objection, the appellee was permitted to ask a witness the following question: "Did you ever hear the neighbors talk about her and Adams going to the show?" The witness answered that she did not think she ever heard the neighbors say anything. Just how this question and the answer to it could have injured the appellant, we are unable to see. The answer was more favorable to him than to the ²³⁹ defendant. The error was, therefore, harmless, if it was error, as to which we do not decide.

Another witness was asked the following question: "Do you know where he [the plaintiff] had left his team, or what he had done with his team?" An objection to this question was sus-

tained. Counsel say the ruling was erroneous, but they do not point out in their brief why, or in what respect, it was so. In the absence of any showing to that effect in the brief, we must presume that the court ruled correctly.

The court excluded testimony of a general character as to how Mrs. Main treated her children. This was right. The appellee had shown that while the children were sick their mother left them and accompanied the appellant to shows and other places of amusement. The court permitted the appellant, in contravention of this proof, to show that during their illness the children were well treated by their mother. There was no evidence tending to prove that the general treatment of Mrs. Main to her children was not good.

It was not so much the conduct of Mrs. Main that the jury was concerned in as that of the appellant. Whatever was proved as to her conduct was proper only for the purpose of showing the effect of the appellant's treatment of the appellee in alienating his wife's affections. In so far as this had been proved, it was proper to rebut it by countervailing evidence. But such evidence must be limited within the scope of the inquiry to which the plaintiff's evidence was confined. It could not have been extended over the whole range of Mrs. Main's deportment to her children. Such latitude, if allowed, would lead to endless questionings and cross-questionings upon collateral and immaterial facts, and would tend to obscure the real issues in the cause.

Appellant complains that appellee was permitted, over the former's objection and exception, to file a second paragraph ²⁴⁰ of complaint after the jury had been sworn and the trial begun.

There was no request by the appellant for delay. He does not make it appear how he was injured. To permit the filing of additional paragraphs of pleadings and of amendments, after the issues are closed, is very largely within the discretion of the court, and, unless the appellant shows affirmatively that he was prejudiced, the ruling will not lead to a reversal: *Leib v. Butterick*, 68 Ind. 199; *Judd v. Small*, 107 Ind. 398; *Levy v. Chittenden*, 120 Ind. 37; *Sanford etc. Co. v. Mullen*, 1 Ind. App. 204.

Section 394 of the statute seems to govern such proceedings, but the power of amendment is inherent in all courts of justice: 3 Blackstone's Commentaries, 407; *Tiernan v. Woodruff*, 5 McLean, 135; *Bank v. Sherman*, 101 U. S. 403.

The appellant insists that his motion for a venire de novo

should have been sustained, because the jury found only upon one paragraph of the complaint, ignoring the other. It was formerly held that a failure to find upon all the issues was a good cause for a venire de novo, but the later cases decide that, if the verdict does not cover all the issues, this is not a defect appearing on the face: *Works' Practice*, 971; *Board v. Pearson*, 120 Ind. 426; 16 Am. St. Rep. 325; *Alexandria etc. Co. v. Painter*, 1 Ind. App. 587.

The appellant should have moved to require the jury to perfect their verdict, if he desired the finding to cover both paragraphs. He was not harmed, however, by the form of the verdict. The finding of the jury upon one paragraph of the complaint, where there is evidence tending to support both, precludes the appellee from ever bringing another action against the appellant on the cause averred in the paragraph as to which no finding was made: *Shaw v. Barnhart*, 17 Ind. 183.

The cases cited by appellant on this point proceed upon the theory that a venire de novo will be granted where the jury fails to find upon all the issues, but this doctrine, as ²⁴¹ we have seen, has been overturned by the more recent decisions.

This disposes of all the questions raised and discussed.

There is no error.

Judgment affirmed.

ACTION FOR ALIENATION OF WIFE'S AFFECTIONS.—An action by a husband for the alienation of the affections of his wife is based on the loss of the consortium, and it is, therefore, not essential to recovery that there should be proof of actual pecuniary loss. The action may also be maintained without proof of adultery. It is an action for seduction. This topic is the subject of a monographic note to *Fratini v. Caslini*, 44 Am. St. Rep. 845-852. In such an action, the wife is not a competent witness for the husband: *Reynolds v. Schaffer*, 91 Mich. 494; 30 Am. St. Rep. 492.

PLEADINGS—AMENDMENTS.—Power to allow amendments to pleadings is, in a large degree, in the discretion of the court, and should be liberally exercised, in the furtherance of justice: *Saint v. Guerrerio*, 17 Col. 448; 31 Am. St. Rep. 320. Amendments to pleadings may be allowed after the parties have announced themselves ready for trial: *Radam v. Capital Microbe etc. Co.*, 81 Tex. 122; 26 Am. St. Rep. 783.

APPEAL.—It will be presumed that the court, in trying a cause, disregarded all improper evidence, and based its finding and judgment upon competent evidence only: *Travelers Ins. Co. v. Murray*, 16 Col. 296; 25 Am. St. Rep. 267. The admission of improper evidence, if not prejudicial, is not reversible error: *St. Louis etc. Ry. Co. v. Hackett*, 58 Ark. 381; 41 Am. St. Rep. 105. When the court can clearly see affirmatively that error has worked no harm to the party appealing, it will be disregarded: *Osborne v. Francis*, 38 W. Va. 312; 45 Am. St. Rep. 859.

INSTRUCTIONS may be refused after the argument has begun: *Evansville etc. R. R. Co. v. Crist*, 116 Ind. 446; 9 Am. St. Rep. 865.

RES JUDICATA.—A judgment is conclusive against a plaintiff as to every matter which he could have proved in the first suit, and which was not proved or withdrawn: See monographic note to *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 569, on proof of *res judicata*.

BOWSER v. COX.

[8 INDIANA APPEALS, 309.]

COTENANCY—ACTION FOR RENT.—If tenants in common have executed a joint demise, they must join in actions based upon the lease, unless it provides for a separate rendering of rent to each, or a separate covenant for the payment of rent to each; but if they have not so bound themselves, and are claiming rents under a lease made by the ancestor, their rights accord with their interests, the accruing rent is apportioned among them, and the tenant can be compelled to pay to each his proportionate share.

F. McCray, T. J. Terhune, and B. S. Higgins, for the appellants.

H. C. Wills and G. W. Spahr, for the appellee.

§10 NEW, J. Harriet E. Cox, the appellee, is the widow of John A. Cox, who died testate in April, 1889. The testator, on the sixteenth day of July, 1888, leased to the appellants certain real estate, with an elevator and machinery connected therewith, at a cash rent of fifty dollars per month, for two years from and after the fifteenth day of August, 1888. The testator left as his only heirs his widow, the appellee, and children as follows: John R. Cox, Mary A. Winters, Margaret A. Wall, Joseph E. Cox, Mabel V. Cox, Ora A. Cox, Robert McCune Cox, and Carrie E. Cox. By the will, the four children first above named, and who are adults, are to receive seven hundred dollars each, less any advancement made to them. The residue of the testator's estate, both real and personal, is given by the will in equal shares to the appellee and the four children last named, said children being minors.

The action is to collect rent alleged to be due from the appellants under said lease. The complaint is in two paragraphs. With the first paragraph copies of the will and lease are filed. It is further shown in this paragraph of the complaint that the legacies given by the will to the four oldest children, and all debts of the estate, have been paid, and that therefore an administration upon the estate is unnecessary. There is no executor named in the will.

Upon issues joined, the cause was submitted to the court for trial, with finding and judgment for the plaintiff. Appellants then moved for a new trial, which motion was overruled.

§11 The ground of demurrer to the first paragraph of the complaint was, that there was a defect of parties plaintiff, in this, that Mabel V. Cox, Robert McCune Cox, Ora A. Cox, and Carrie E. Cox are necessary parties plaintiff.

The contention of counsel for the appellants, as we understand them, is, that, inasmuch as the four children last named are, under the will, possessed of interests in the estate in common with the appellee, therefore, there can be no recovery of any part of the rent in this action by the appellee as sole plaintiff.

The appellee and the four children named in the demurrer are tenants in common, but the lease or demise on which the rent has accrued was not made by them, but by the ancestor, and hence, as tenants in common, the interest of each is in severalty.

Where there is a joint demise executed by tenants in common, they must join in actions based upon the lease, unless the lease provides for a separate rendering of rent to each, or a separate covenant for the payment of rent to each. But where tenants in common have not bound themselves by a joint demise, but are claiming rents under a lease made by the ancestor, their rights accord with their interests, the accruing rent is apportioned among them, and the tenant can be compelled to pay to each his proportionate share: Bliss on Code Pleading, 2d ed., secs. 67-69; Crosby v. Loop, 13 Ill. 625; Cole v. Patterson, 25 Wend. 456; Jones v. Felch, 3 Bosw. 63. We do not think our code has changed this rule.

The interests of the appellee and the four children named in the demurrer cannot be said to be the same, for they are several and distinct. Each is the real party in interest as to his or her several, though undivided, part. It is unlike the case of joint tenants, cotrustees, partners, joint owners, or joint contractors, where a separate judgment would not be proper in favor of one of them.

§12 The court did not err in overruling the demurrer to the first paragraph of the complaint.

The judgment is affirmed, with costs.

COTENANTS, ACTION BY, FOR RENT.—Tenants in common may maintain a joint action to recover rent due on a lease of the common property which contains a covenant to pay rent to the lessors jointly, although, by a memorandum annexed to the lease, and forming part of it, it is agreed that one-half of the rent shall be paid to each of the lessors separately: Wall v. Hinds, 4 Gray, 256; 64 Am. Dec. 64. Tenants in common may sever their actions, where they lease property, and reserve separate portions to each: Lahy v. Holland, 8 Gill, 445; 56 Am. Dec. 705.

**CHAPPELL v. MISSIONARY SOCIETY OF THE CHURCHES
OF CHRIST IN INDIANA.**

[8 INDIANA APPEALS, 356.]

WILLS—EXTRINSIC EVIDENCE.—For the purpose of determining the object of a testator's bounty in a will, extrinsic evidence is admissible to identify the legatee.

IDENTIFICATION OF LEGATEE—EXTRINSIC EVIDENCE. Though no person or corporation in existence precisely answers to the name or description of the person or corporation to be benefited by a will, extrinsic evidence is admissible to show who was intended. Hence, such evidence is competent to show that a bequest by a testatrix, a member of the Church of Christ, to the "Christian Missionary Society" of a certain state, was intended for the "Missionary Society of the Churches of Christ" of that state.

E. P. Richardson and A. H. Taylor, for the appellant.

E. A. Ely and S. G. Davenport, for the appellee.

³⁵⁶ ROBINSON, C. J. Appellee filed in the court below its ³⁵⁷ petition asking for an order on appellant to pay it the sum of five hundred dollars, bequeathed by the decedent in her last will and testament.

Appellant demurred to the petition, which was overruled, and exception taken. There was a trial by the court, and finding and judgment for the appellee, ordering the appellant to pay the appellee the legacy as prayed for in the petition. Under the assignment of error but one question is presented, which is the alleged error of the court in overruling the demurrer to the complaint or petition.

A copy of the will of the testatrix was filed with, and made a part of, the petition. That part of the will under which appellee claimed the bequest reads as follows, to wit:

"Second. That after paying all my just debts and funeral expenses, I bequeath to the Christian Missionary Society of this state five hundred dollars, the balance to be equally divided between my legal heirs."

The material facts stated in the petition were, "that Hannah Chappell departed this life testate; that her will was probated January 19, 1883; that, by the terms of her will, she bequeathed to the appellee, by the name of the Christian Missionary Society of this state, five hundred dollars; that the appellee was the missionary society named in said will; that at the time said will was made, and for a long time before, and until the day of said Hannah Chappell's death, she was a member of the Church of Christ in Indiana, commonly called and known as the 'Christian Church'; that the appellee was, during all of said time, the only

missionary society of said church in Indiana, and during all of said time commonly called the Christian Missionary Society of this state, and was as well known by said name as its true and legal name of 'Missionary Society of the Churches of Christ in Indiana'; that the appellee was the legatee named in said will, and was entitled to receive said sum so bequeathed to it."

³⁵⁸ It was then shown that the administrator with the will annexed had sold the real estate mentioned in the will, as therein directed, and had in his hands sufficient, after paying all debts of said estate, funeral expenses, and cost of administration, to pay said bequest in full, but neglected and refused to pay the same, although often requested so to do. Wherefore prayer for an order, etc., requiring said administrator, etc., to show cause why said bequest should not be paid, etc.

The grounds of objection made to the will are that the bequest is void for uncertainty, and that this is made to appear by the petition; that the bequest was made to the "Christian Missionary Society of this state," when the true and legal name of that society was alleged to be the Missionary Society of the Churches of Christ in Indiana; that there was nothing upon the face of the will showing a mistake, and that extrinsic evidence could not be resorted to for the purpose of showing that the appellee was the society intended in said bequest.

The doctrine has been declared by the supreme court of this state, that, "in the construction of a will, the primary object is to discover and give effect to the intention of the testator, as it appears upon and is gathered from the words found in the instrument, and, although the testator's purpose must have been expressed in a manner conformable to the rules by which rights of property are secured and established, the law will not suffer his intention to be defeated merely because it may not have been declared with completeness, or with technical accuracy": *Skinner v. Harrison Tp.*, 116 Ind. 139; *Van Gorder v. Smith*, 99 Ind. 404.

The averments in the petition, that the appellee was the missionary society mentioned in the will, that the testatrix was at the time of making said will, for a long time before, and until her death, a member of the Church of Christ, in Indiana, commonly called the Christian Church, and that, during all of said time, the appellee was the only missionary ³⁵⁹ society of said church in Indiana, and that it was as well known by the name of the Christian Missionary Society of this state as by its true and legal name of Missionary Society of the Churches of Christ in Indiana, and was commonly called the Christian Mis-

missionary Society in this state, were facts proper and pertinent for the purpose of identifying the appellee as the legatee in said will: *Tilton v. American Bible Soc.*, 60 N. H. 377; 49 Am. Rep. 321; *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Cruse v. Axtell*, 50 Ind. 49; *Skinner v. Harrison Tp.*, 116 Ind. 139.

The authorities seem to settle the rule in the construction of a will to be, that, in looking for the intention of the testator, surrounding circumstances may be taken into consideration, but that extrinsic evidence will not be received to vary, contradict, or control the terms of a will; yet that evidence of surrounding circumstances, of the subject matter of the devise, and the person to be benefited thereby, is receivable to enable the court to determine both the subject and object of the testator's bounty; and for the purpose of determining the object of a testator's bounty, or the subject of disposition, a court may inquire into every material fact relating to the person who claims under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator: *Wigram on Wills*, 101, 109, 112, 142; 1 *Redfield on Wills*, 488, 578, 587, 597, 600, 621, 623; 1 *Greenleaf on Evidence*, 13th ed., sec. 287, and note; *Skinner v. Harrison Tp.*, 116 Ind. 139; *Elliott v. Elliott*, 117 Ind. 380; 10 Am. St. Rep. 54; *Noe v. Kern*, 93 Mo. 367; 3 Am. St. Rep. 544; *Hall v. Stephens*, 65 Mo. 670; 27 Am. Rep. 302.

The case of *Skinner v. Harrison Tp.*, 116 Ind. 139, is directly in point in the case before us. In that case, the testator devised certain real estate to Harrison township. It was contended that the will was void for uncertainty, because the will did not say whether it was the civil or school township of Harrison ~~300~~ that was meant, nor Harrison township of what county, there being twenty-two townships of that name in Indiana. The court held that extrinsic evidence was admissible to show that the testator resided in Harrison township of Cass county, and sustained peculiar relations to that township, for the purpose of identifying that as the object of his bounty; and the court further held, as we have before seen, that the law would not suffer the testator's intention to be defeated, merely because it may not have been declared with completeness or with technical accuracy.

The testatrix in the case before us was a member of the Christian Church. It had but one missionary society. The petition alleges that was the appellee, and that it was commonly known by the name of the "Christian Missionary Society of this

state," the legatee named in the will. These facts make the case analogous to *Skinner v. Harrison Tp.*, 116 Ind. 139.

In a note to *Chambers v. Watson*, 46 Am. Rep. 77, the law is stated thus: "A misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision or defeat the intention of the testator, if, either from the will itself or evidence dehors the will, the object of the testator's bounty can be ascertained. No principle is better settled than that parol evidence is admissible to remove latent ambiguities, and when there is no person or corporation in existence precisely answering to the name or description in the will, parol evidence may be given to ascertain who were intended by the testator. A corporation may be designated by its corporate name, by the name by which it is usually or popularly called and known, by a name by which it was known and called by the testator, or by any name or description by which it can be distinguished from every other corporation; and when any but the corporate name is used, the circumstances to enable the court to apply the name or description to a particular corporation, and identify it as the body intended, ³⁶¹ and to distinguish it from all others and bring it within the terms of the will, may, in all cases, be proved by parol: *St. Luke's Home v. Association*, 52 N. Y. 191; 11 Am. Rep. 697; *Holmes v. Mead*, 52 N. Y. 332; *Gardner v. Heyer*, 2 Paige, 11; 1 *Jarman on Wills*, 330; 1 *Redfield on Wills*, sec. 42, p. 691, pl. 40, p. 695, pl. 49.

It does not seem necessary to further extend this opinion. The authorities clearly sustain the ruling of the circuit court.

Judgment affirmed, with costs.

Extrinsic Evidence to Explain Wills.*

GENERAL RULE.—A cardinal rule in the construction of wills is, to give effect to the intention of the testator. Where such intention appears clearly upon the face of the will, there is nothing for a court to do but to give the will effect, according to its terms. The will must speak for itself, and from it the intention of the testator must be gathered. A court has no power to make a new disposition of the testator's property, by adding to, taking from, or otherwise varying his will, and it is settled in the law of wills that the intention of the testator must be given effect according to what appears upon the face of the will. Extrinsic evidence is often admitted to aid or explain wills, but it is always anchored to what appears upon the face of the will, and is always excluded where its effect is to remodel the will. These propo-

* REFERENCE TO MONOGRAPHIC NOTES.

Parol evidence of a trust in a bequest: 24 Am. Dec. 418-417.

Rights of child or issue unintentionally omitted from will: 39 Am. Dec. 740-744.

Reforming and correcting wills in equity: 66 Am. Dec. 633-637.

Admissibility of parol evidence to explain misdescription in wills: 3 Am. Rep. 669-672.

Parol evidence to correct a will: 40 Am. Rep. 292-295.

Extrinsic evidence to aid imperfect description in wills: 46 Am. Rep. 72-73.

Mistake, in will, of description of land: 58 Am. Rep. 74-81.

sitions are elementary and, if kept in mind, will enable one to grasp the principles running through the myriads of cases which either permit or exclude the introduction of extrinsic evidence to aid or explain wills. While the authorities on the subject are legion, the principles involved are few and simple. A will must stand as it is written, where the intention is clearly expressed, and it must be construed by its own terms. It cannot be changed, remodeled, or contradicted by means of extrinsic evidence, though the consequences may be the total or partial failure of the testator's intended disposition. Whatever a court may do in construing a will, it must not change the character of the instrument: *Bingel v. Volz*, 142 Ill. 214; 34 Am. St. Rep. 64; *Eatherly v. Eatherly*, 1 Cold. 461; 78 Am. Dec. 499; *Barnes v. Simms*, 5 Ired. Eq. 392; 49 Am. Dec. 435; *McCray v. Lipp*, 35 Ind. 116; *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Gilmor's Estate*, 154 Pa. St. 523; 35 Am. St. Rep. 855; *Jones v. Quattlebaum*, 31 S. C. 607; *Waters v. Bishop*, 122 Ind. 516; *Taylor v. Maris*, 90 N. C. 619; *Allen v. Allen*, 18 How. 385; *Cleveland v. Havens*, 13 N. J. Eq. 101; 78 Am. Dec. 90; *Griscom v. Evens*, 40 N. J. L. 402; 29 Am. Rep. 251; *Vickery v. Hobbs*, 21 Tex. 570; 73 Am. Dec. 238; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665; monographic note to *Goode v. Goode*, 66 Am. Dec. 635, on reforming and correcting wills in equity. Hence, omissions or defects in a written will cannot be supplied by parol evidence: *Abercrombie v. Abercrombie*, 27 Ala. 489; *Taylor v. Maris*, 90 N. C. 619. For example, such evidence is not admissible to show that certain legacies, intended to have been given to certain persons, were omitted by the person who drafted the will: *Comstock v. Hadlyme etc. Soc.*, 8 Conn. 254; 20 Am. Dec. 100. So, parol evidence is not admissible to show that, in drawing the will, the scrivener inserted words that varied the meaning of the instrument: *Iddings v. Iddings*, 7 Serg. & R. 111; 10 Am. Dec. 450; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; 14 Am. Rep. 538; *Griscom v. Evens*, 40 N. J. L. 402; 29 Am. Rep. 251. Neither can it be admitted to add to, or strike out, any words in a devise: *Jones v. Quattlebaum*, 31 S. C. 607; *Waters v. Bishop*, 122 Ind. 516. The interests of children, as residuary devisees, cannot be diminished by construing the will according to the intention of the testator, as shown by parol evidence: *Hatch v. Ferguson*, 57 Fed. Rep. 966, 971.

Extrinsic Evidence is not Admissible to explain anything to which no reference is made on the face of the will: *Eatherly v. Eatherly*, 1 Cold. 461; 78 Am. Dec. 499; *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Jones v. Quattlebaum*, 31 S. C. 607; *Waters v. Bishop*, 122 Ind. 516; *Allen v. Allen*, 18 How. 385; *Griscom v. Evens*, 40 N. J. L. 402; 29 Am. Rep. 251; *Bingel v. Volz*, 142 Ill. 214; 34 Am. St. Rep. 64; *Barnes v. Simms*, 5 Ired. Eq. 392; 49 Am. Dec. 435; *Clift v. Moses*, 116 N. Y. 144, 155; *Waldron v. Waldron*, 45 Mich. 350; *Heidenheimer v. Bauman*, 84 Tex. 174; 31 Am. St. Rep. 29; *Thomas v. Lines*, 83 N. C. 191, 197; *Williams v. Vreeland*, 32 N. J. Eq. 734; *Denfield*, Petitioner, 156 Mass. 265; *Taubenhan v. Dunz*, 125 Ill. 524. Hence, a trust in lands cannot, ordinarily, be established by parol, in a devise absolute upon its face: *Elliott v. Morris*, 1 Harp. Eq. 281; but it has been held that a trust may be established, by parol, in an absolute bequest, by showing that the legatee received it upon a promise made to the testator to provide for a third person out of it: *Towles v. Burton*, Rich. Eq. Cas. 146; 24 Am. Dec. 409, and monographic note thereto on parol evidence of a trust in a bequest. Parol evidence is inadmissible to show that a provision for a widow in a will was intended to be in lieu of dower. She is not deprived of dower, or testamentary disposition, if the will contains nothing declaring the provision to be in lieu and bar of dower: *Hall v. Hall*, 8 Rich. 407; 64 Am. Dec. 758. Such evidence, in the absence of any language in the will showing a contrary intention, is inadmissible to charge a legacy on land: *McGough v. Hughes*, 18 R. I. 768. If a will fully describes a person or thing, whether by many or few particulars, it is

not competent to receive extrinsic evidence of what was intended, where nothing is found to answer the description. To pass another thing, or to pass the thing to another person, than that described in the will, is to give it operation over a thing, or in favor of a person, not mentioned in it: *Barnes v. Simms*, 5 Ired. Eq. 392; 49 Am. Dec. 435. Thus, where the testator, in the times of slavery, bequeathed a negro by the name of "Aaron," and it was shown that he had no negro of that name, but did have one by the name of "Lamon," not mentioned in the will, the court could not say that Lamon passed by the bequest: *Barnes v. Simms*, 5 Ired. Eq. 392; 49 Am. Dec. 435.

If a Paper, Referred to by a Testator as a Part of his Will, is clearly and certainly identified, it is not necessary that it should be probated and recorded with the will, in order to give it effect as a part of the will. But, if a testator, in his will, divides his lands among his children, in accordance with "deeds" referred to as having been made by him, mere memoranda made by a surveyor, and not signed by the testator, cannot be identified by parol testimony as the "deeds" intended by the testator. This would be to change, by parol testimony, the entire character of the instrument referred to as a part of the will: *Tuttle v. Berryman*, 94 Ky. 553. A will, on its face, or by reference to some writing existing at the time when the will is executed, and so referred to and identified as to become a part of it, must declare, not only what enumerated bequests and devises shall be, but also who shall take them, directly, or beneficially through a trustee, and an extraneous writing not so identified is inadmissible to aid a trust created by will without naming a beneficiary: *Heidenheimer v. Bauman*, 84 Tex. 174; 31 Am. St. Rep. 29.

INTENTION CANNOT BE SHOWN BY EXTRINSIC EVIDENCE. The question of first importance in the construction of any will is, What was the intention of the testator? When that is ascertained, effect is to be given thereto. In the absence of latent ambiguity, such intention is to be gathered alone from the will itself, from a full view and consideration of everything therein contained. Extrinsic evidence is admissible to explain what a testator has written, but not to show what he intended to write. A court cannot make a new devise for him, but the one he made himself must be given effect in the light of surrounding circumstances. But, in searching for the intention of the testator, it must be borne in mind that the intention sought for is not that which existed in the mind of the testator, but that which is expressed by the language of the will. So, while surrounding circumstances may be considered, in construing a will, for the purpose of determining the objects of the testator's bounty, or the subject of disposition, yet they cannot be resorted to for the purpose of importing into the will any intention which is not there expressed. Even where extrinsic evidence is admitted to explain the will, the testator's intention must ultimately be determined from the language of the instrument as explained by such extrinsic evidence, and no extrinsic testimony, however conclusive in its nature, can be admitted with a view of setting up an intention inconsistent with the writing itself: *Bingel v. Volz*, 142 Ill. 214; 34 Am. St. Rep. 64; *Taubenhan v. Dunz*, 125 Ill. 524; *Griscom v. Evens*, 40 N. J. L. 402; 29 Am. Rep. 251; *Heidenheimer v. Bauman*, 84 Tex. 174; 31 Am. St. Rep. 29; *Sturgis v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349; *Allen v. Allen*, 18 How. 385; *Mackie v. Story*, 93 U. S. 589; *Denfield, Petitioner*, 156 Mass. 285; *Williams v. Vreeland*, 32 N. J. Eq. 734; *Larmour v. Rich*, 71 Md. 369; *Thomas v. Lines*, 83 N. C. 191, 197; *Waldron v. Waldron*, 45 Mich. 350; *Clift v. Moses*, 116 N. Y. 144, 155; monographic note to *Goode v. Goode*, 66 Am. Dec. 635, on reforming and correcting wills in equity; *Ehrman v. Hoskins*, 67 Miss. 192; 19 Am. St. Rep. 297; *Warner v. Miltenberger*, 21 Md. 264; 83 Am. Dec. 573; *McAllister v. Tate*, 11 Rich. 509; 73 Am. Dec. 119; monographic note to *Chambers v. Watson*, 46 Am. Rep. 72, on imperfect description in will; *Barnes v. Simms*, 5 Ired. Eq. 392; 49 Am. Dec. 435; *McCray v. Lipp*, 85 Ind. 116; *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690;

Gilmor's Estate, 154 Pa. St. 523; 35 Am. St. Rep. 855; Kirkland v. Conway, 116 Ill. 438; McCauley v. Buckner, 87 Ky. 191. Parol evidence is not admissible to prove that a testator intended to devise a different lot from that described in his will, and that his intention was not correctly expressed in the will, owing to a misapprehension of the draughtsman as to the lot intended to be described: Ehrman v. Hoskins, 67 Miss. 192; 19 Am. St. Rep. 297. Such evidence, even of the person who drew the will, though of unimpeachable character, is not admissible to prove a mistake, showing that the testator intended to dispose of the property in a manner different from that shown on the face of the will: Rothmahler v. Myers, 4 Desaus. Eq. 215; 6 Am. Dec. 613; and the testator's meaning of ambiguous words in a will cannot be shown by the testimony of the one who drew the will: McAllister v. Tate, 11 Rich. 509; 73 Am. Dec. 119.

Declarations.—The exclusion of extrinsic evidence, in construing a will, as to the testator's intent, excludes, of course, any oral declarations or statements he may have made as to his wishes and intentions regarding the disposition of his property; and the rule is, that such evidence is never admissible for the purpose of showing a testator's intention by proof of his oral declarations of intent, either as to the persons who shall take his estate, or as to what particular part of his estate any one person was intended to receive: Heidenheimer v. Bauman, 84 Tex. 174; 31 Am. St. Rep. 29; Denfield, Petitioner, 156 Mass. 265; McCray v. Lipp, 35 Ind. 116; Kirkland v. Conway, 116 Ill. 438; In re Gilmore, 81 Cal. 240; Read v. Payne, 3 Call. 225; 2 Am. Dec. 550; Magee v. McNiel, 41 Miss. 17; 90 Am. Dec. 354. Thus, the declarations of a testator to the scrivener of the will are not admissible to explain conflicting provisions of the will itself: Lewis v. Douglass, 14 R. I. 604; nor to show the extent of the interest he intended to give a devisee by his will: Kirkland v. Conway, 116 Ill. 438; nor to show his own understanding of the meaning of his will, or the purpose of contravening or altering the legal interpretation thereof, and its consequences: Comfort v. Mather, 2 Watts & S. 450; 37 Am. Dec. 523. The declarations of a testator, made to his executor just before his death, and more than five years after the date of the will, as to what was intended by the will, and who wrote it, constitute no part of the *res gestæ*, and are not admissible in evidence: In re Gilmore, 81 Cal. 240. In Williams v. Vreeland, 32 N. J. Eq. 734, it is held that any declaration of intention on the part of a testator, different from that expressed in the will, is incompetent as evidence, unless it was communicated to the legatee, assented to by him, and such assent acted upon by the testator. In cases coming within exceptions to the general rule, allowing extrinsic evidence to be admitted to explain wills, and which exceptions are treated farther on in this note, the acts and declarations of a testator in respect to the thing granted, or the person intended, are admissible to remove a latent ambiguity in the will: Brownfield v. Brownfield, 12 Pa. St. 136; 51 Am. Dec. 590. But, when such testimony is introduced, it must be of facts unconnected with any general declaration or wishes expressed by the testator for the disposition of his property. If the testimony offered purports merely to express those declarations or wishes, it is inadmissible: Weatherhead v. Baskerville, 11 How. 329. The written declarations of a testator, in the form of a paper purporting to have been executed as a will years anterior to the date of a will in contest, may be received in evidence on the trial of the issue, *devisavit vel non*, to show his intentions as to the disposition of his property: Demonbrenn v. Walker, 4 Baxt. 199. Parol declarations of a testator, made before or after the execution of a will, cannot be admitted in evidence for the purpose of invalidating it, but may be received for the purpose of showing his knowledge of its contents, when it is claimed that he was imposed upon by not being informed thereof: Robinson v. Brewster, 140 Ill. 649; 33 Am. St. Rep. 265. On an issue as to whether a certain tract of land in dispute was intended by a testator to pass under a devise of his "home place," evi-

dence that he had given parcels of land to certain of his sons, before his death, is irrelevant: *Waggoner v. Ball*, 95 N. C. 323.

ADMISSION OF EXTRINSIC EVIDENCE IN CASES OF MISTAKE.—The rule is, that extrinsic evidence is not admissible to explain a pure mistake in a will, unless the language of the will itself furnishes the basis of the correction. The mistake must be apparent upon the face of the will, and so apparent that the correction may be made by a proper construction of the terms of the will. Otherwise, there can be no relief: *Funk v. Davis*, 103 Ind. 281; *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Judy v. Gilbert*, 77 Ind. 96; 40 Am. Rep. 289; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665; *Gifford v. Dyer*, 2 R. I. 99; 57 Am. Dec. 708; *Rothmahler v. Myers*, 4 Desaus. Eq. 215; 6 Am. Dec. 613; monographic note to *Goode v. Goode*, 66 Am. Dec. 633, on reforming and correcting wills in equity.

The jurisdiction of courts of equity to correct errors and mistakes in wills is exercised with great caution. There is no power in equity to reform a will. Hence, if a testator devises land which he does not own, accurately describing it, a bill in equity does not lie to construe the will on the ground of mistake, and to substitute another tract of land owned by the testator in the place of the one devised: *Bingel v. Volz*, 142 Ill. 214; 34 Am. St. Rep. 64; note to *Goode v. Goode*, 66 Am. Dec. 635. It has even been held that it must appear what the will would have been but for the mistake: *Gifford v. Dyer*, 2 R. I. 99; 57 Am. Dec. 708. To illustrate what is said above, land in "section 32" was devised by a will to E., and land in "section 31" was devised to J., and parol evidence was held to be inadmissible to show that the draughtsman of the will made a mistake, or that "section 32" should be section 33, and "section 31" should be section 32: *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665, and note reviewing many English cases. So, where the plaintiff's complaint stated in substance that the testator had borrowed money of his wife, to buy the "northeast quarter of the southeast quarter" of a section of land, agreeing to devise the land to her for life, with remainder to her children; that he executed his will, intending to conform to that agreement, but, by mistake, the will described the land as the "northeast quarter of the southwest quarter" and that he owned no such land, and no other land than the lot misdescribed, it was held that parol evidence of such facts was inadmissible: *Judy v. Gilbert*, 77 Ind. 96; 40 Am. Rep. 289, and monographic note commenting on the unreliability of early English cases, in admitting parol evidence to correct wills. A devise from which the subject matter has been omitted is not open to construction. Hence, parol evidence cannot be resorted to for the purpose of supplying a description of land omitted from a devise. There is nothing whatever on the face of the instrument to denote what real estate the testator had in view, nor anything to incline the intention one way rather than another in search of it: See numerous cases cited in the monographic note to *Chambers v. Watson*, 46 Am. Rep. 75, on imperfect description in will. The strict rule, however, as to a clear mistake, disconnected from anything in the will to show what the mistake is, does not apply to mere inadequacies or imperfections of description, as it is always competent to supplement the language of the will by extrinsic evidence, so far as is necessary to apply the language of the will to the object or person intended. There is a vast difference between leaving out the subject matter of a devise, and inserting something else by mistake, and a case in which the testator showed upon the face of the will what he had in view, but imperfectly expressed it. Thus, a devise of "sixty acres, se. 25, toon 7, and forty acres, se. 24, toon 6, Jasper county," refers to sections and townships, and parol evidence is competent to show the township and range of the lands: *Chambers v. Watson*, 60 Iowa, 339; 46 Am. Rep. 70, and monographic note thereto, on imperfect description in will. In construing a devise of "that part of the McKinstry farm at present occupied and farmed by Brown, containing eight fields,"

extrinsic evidence is admissible to show that the description "containing eight fields" was a mistake and that the part occupied, etc., by Brown contained nine fields: *Coleman v. Eberly*, 76 Pa. St. 19.

ADMISSION OF EXTRINSIC EVIDENCE TO SHOW THAT CHILD WAS INTENTIONALLY OMITTED.—Under statutes enacting that, when a testator omits to provide in his will for any of his children, or the issue of any deceased child, such child or issue of a child shall have the same share in the estate it would have had had the testator died intestate, "unless it shall appear that such omission was intentional," there is a conflict of authority as to whether the intention of the testator must be gathered from the will alone, without resort to extrinsic evidence. Some of the cases hold that parol evidence is inadmissible for the purpose of determining whether the omission from a will of one entitled, in the event of intestacy, to take of the estate, was intentional on the part of the testator, and that this can be determined only from the face of the will: *In re Salmon*, 107 Cal. 614; 48 Am. St. Rep. 164; *Estate of Garraud*, 35 Cal. 336; *Chace v. Chace*, 6 R. I. 407; 78 Am. Dec. 446; *Bradley v. Bradley*, 24 Mo. 311; *Bower v. Bower*, 5 Wash. 225; *Burns v. Allen*, 93 Tenn. 149. But other cases hold that extrinsic evidence is admissible for the purpose of showing that certain of the testator's children, who did not receive anything under the will, were intentionally omitted: *Whittemore v. Russell*, 80 Me. 297; 6 Am. St. Rep. 200; *Lorieux v. Keller*, 5 Iowa, 196; 68 Am. Dec. 696. It is the settled law in Massachusetts: *Wilson v. Fosket*, 6 Met. 400; 39 Am. Dec. 736; *Converse v. Wales*, 4 Allen, 512; *Ramsdill v. Wentworth*, 101 Mass. 125; *Buckley v. Gerard*, 123 Mass. 8; and is the law announced by the supreme court of the United States: *Coulam v. Doull*, 133 U. S. 216. The rights of a child or issue unintentionally omitted from a will is the subject of a monographic note to *Wilson v. Fosket*, 39 Am. Dec. 740-744.

EXCEPTIONS PERMITTING THE ADMISSION OF EXTRINSIC EVIDENCE, GENERALLY.—In construing a will, the court may put itself in the place of the testator, by looking into the state of his property, and the circumstances by which he was surrounded when he made the will. Without such information the will could not, oftentimes, be sensibly construed: *Whitcomb v. Rodman*, 156 Ill. 116; 47 Am. St. Rep. 181; *Bingel v. Volz*, 142 Ill. 214; 34 Am. St. Rep. 64; *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552; *Griscom v. Evens*, 40 N. J. L. 402; 29 Am. Rep. 251; *Tuxbury v. French*, 41 Mich. 7; *Patch v. White*, 117 U. S. 210. Thus, in a devise of land, the number, time of purchase, relative situation, occupation, and use of the respective lots, and their improvement, inclosure, and designation by the testator, in his lifetime, may be shown, by extrinsic proof, in construing the will: *Benham v. Hendrickson*, 32 N. J. Eq. 441. By thus putting itself in the testator's place, the court is better enabled to understand the meaning and application of the language he has adopted. It is entirely proper for the court, in construing a will, to look at the whole of it, for the purpose of ascertaining the intention of the testator in any particular part, where such part is ambiguous. And a court may give effect to a will containing errors or repugnancies, so far as it can carry out the clear and evident intention of the testator. It will pronounce for the will, not in its actual state, but with its repugnancies removed or errors corrected: *Eatherly v. Eatherly*, 1 Cold. 461; 78 Am. Dec. 499; *Patch v. White*, 117 U. S. 210; *Whitcomb v. Rodman*, 156 Ill. 116; 47 Am. St. Rep. 181; *Bingel v. Volz*, 142 Ill. 214; 34 Am. St. Rep. 64; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; 14 Am. Rep. 538; *Sturgis v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349; *Henderson v. Henderson*, 113 N. Y. 1; *Donohue v. Donohue*, 54 Kan. 136.

If the intention of a will, as disclosed by its terms, is clear and certain, extrinsic evidence is inadmissible, as there is no necessity for it, and it cannot be admitted to alter, add to, or take from, the terms of the will: *McDaniel v. King*, 90 N. C. 597; *Taylor v. Maria*, 90 N. C. 619;

Hill v. Felton, 47 Ga. 455; 15 Am. Rep. 643; Clark v. Clark, 2 Lea, 723; Carson v. Searcy, 66 Ga. 550; Paton v. Ormerod (1892), Prob. Div. 247; Forbes v. Darling, 94 Mich. 621; Farnham v. Barker, 148 Mass. 204; Gilmor's Estate, 154 Pa. St. 523; 35 Am. St. Rep. 855. But, if there is any uncertainty or indefiniteness on the face of the will which may be explained by extrinsic evidence, or if a latent ambiguity is raised by proof of extrinsic circumstances, such evidence is admitted merely to explain, or make certain, what the testator has written; to give effect to what is expressed in his will. Any ambiguity explainable by extrinsic evidence must appear upon the face of the will: Warner v. Miltenberger, 21 Md. 264; 83 Am. Dec. 573; Patch v. White, 117 U. S. 210; Griscom v. Evens, 40 N. J. L. 402; 29 Am. Rep. 251; Heidenheimer v. Bauman, 84 Tex. 174; 31 Am. St. Rep. 29; Coulam v. Doull, 133 U. S. 216; monographic note to Kurtz v. Hibner, 8 Am. Rep. 669-673; Sturgis v. Work, 122 Ind. 134; 17 Am. St. Rep. 349; Eatherly v. Eatherly, 1 Cold. 461; 78 Am. Dec. 499; Gilmor's Estate, 154 Pa. St. 523; 35 Am. St. Rep. 855.

Thus, the circumstances, situation, and surroundings of a testator, at the time of executing his will, may be shown by extrinsic evidence, if there is any ambiguity or obscurity in the language used, to place the court in his situation, and thus enable it to understand the meaning and application of the language he has adopted: Barnard v. Barlow, 50 N. J. Eq. 131; White v. Holland, 92 Ga. 216; 44 Am. St. Rep. 87, and note; Griscom v. Evens, 40 N. J. L. 402; 29 Am. Rep. 251; Henry v. Henry, 81 Ky. 342; Waldron v. Waldron, 45 Mich. 350; Succession of Ehrenberg, 21 La. Ann. 280; 99 Am. Dec. 729; Bingel v. Volz, 142 Ill. 214; 34 Am. St. Rep. 64; Eberts v. Eberts, 42 Mich. 404.

Courts of equity, in construing wills, will sometimes reject words that are unmeaning, or inconsistent with other parts of the will; or supply words omitted through inadvertence; or transpose words or clauses, when the immediate context or general scheme of the will demands the transposition; or change one word to another, if such change is regarded as necessary to carry out the intention of the testator, made manifest by the other parts of the will: See monographic note to Goode v. Goode, 66 Am. Dec. 635, on reforming and correcting wills in equity. The courts will not construe "or" to be "and" and "and" to be "or," except where it is absolutely necessary to support the evident meaning of the testator: Gilmor's Estate, 154 Pa. St. 523; 35 Am. St. Rep. 855. Ordinarily, no word, or phrase, in a testament can be diverted from its appropriate subject by extrinsic evidence showing that the testator commonly, or on that particular occasion, used the disputed word in a sense peculiar to himself, or even in a popular sense, as distinguished from its strict and primary import: Yundt's Appeal, 13 Pa. St. 575; 53 Am. Dec. 496; but extrinsic evidence is sometimes very essential to show the sense in which a word was used, in order to arrive at the testator's intention. For example, if one who has been bequeathed a certain "lot" of land, by will, brings ejectment for its recovery, it is competent for him to show, by testimony derived from other parts of the will, and by extrinsic evidence, explaining the sense in which the testator used the word "lot," that it embraced a large lot of ground, and was not intended to refer to an ordinary town lot: Warner v. Miltenberger, 21 Md. 264; 83 Am. Dec. 573. If words of indefinite signification are used in a will, as "my farm and plantation," and there is nothing on the face of the instrument to qualify them, or to limit and apply them to a particular subject matter, evidence of extrinsic circumstances, matters of fact, as distinguished from mere declarations of intention, is admissible for the purpose of ascertaining in what sense such indefinite language was used. The office of such evidence is interpretation—to find out the true sense of the written words as the testator used them. When such evidence is received and the facts are either admitted or found, the testator's intention is to be determined by the court's construction of the language of the entire instrument, after the sense of such general words has been ascertained by the ex-

trinsic proof: *Griscom v. Evens*, 40 N. J. L. 402; 29 Am. Rep. 251. Parol evidence is admissible to show the extent of a privilege, previously enjoyed by its devisee, to give effect to a devise: *Maack v. Nason*, 21 Vt. 115; 52 Am. Dec. 41. The testator's knowledge of the contents of the will may be shown by circumstances: *Montagne v. Allan*, 78 Va. 592; 49 Am. Rep. 384. Parol evidence is admissible to explain an indebtedness referred to in a will: *Scott v. Neeves*, 77 Wis. 305. It is competent to show that, at the time of the republication of a will, the words "or to their heirs" were added; and that the word "deceased" was added after the names of each of the legatees who were dead. The circumstances under which these additions were made by the testator may also be shown. In such a case, the testator intended the words "or to their heirs" as words of substitution; and, by the use of the word "deceased," he indicated that, as the legatees were dead, they were not to receive the legacies: *Gilmor's Estate*, 154 Pa. St. 523; 35 Am. St. Rep. 855. The word "children" imports legitimate children in a devise, and can be explained or enlarged so as to include illegitimate children only by clear expression, or necessary implication on the face of the will itself; but extrinsic evidence to show who are the legitimate, and who the illegitimate, children, in such a case is admissible: *Shearman v. Angel*, 1 Bail. Eq. 351; 23 Am. Dec. 166.

While circumstances surrounding the testator at the time of making a will may, where its language is of doubtful import, be proved for the purpose of arriving at the testator's intention, the intent then existing, when ascertained, must have effect, and cannot be varied by events which subsequently occur. Therefore, circumstances occurring after the execution of the will, which could not have been within the contemplation of the testator at that time, cannot be introduced to show a different intent: *Morris v. Sickly*, 133 N. Y. 456; but parol evidence of the declarations of the testator are admissible to give either a name or character to the devisee or the property devised; and it is immaterial whether the declarations were prior, contemporaneous with, or subsequent to, the making of the will, provided they relate to the intention he had at the time of making the will: *Morgan v. Burrows*, 45 Wis. 211; 30 Am. Rep. 717.

Extrinsic evidence is admissible, in the construction of wills, to identify the person to be benefited, or the subject matter disposed of. These two exceptions to the general rule will be specially noticed farther on. Another exception to the general rule excluding extrinsic evidence in the interpretation of wills is, that such evidence is admissible to rebut a resulting trust: *Avery v. Chappel*, 6 Conn. 270; 16 Am. Dec. 53; *Iddings v. Iddings*, 7 Serg. & R. 111; 10 Am. Dec. 450; *Mann v. Mann*, 14 Johns. 1; 7 Am. Dec. 416; *Taylor v. Maris*, 90 N. C. 619; or to show that an absolute devise of land was accompanied by a secret trust in favor of one other than the devisee: *Jones v. McKee*, 3 Pa. St. 496; 45 Am. Dec. 661.

It has sometimes been said that extrinsic evidence is admissible in the construction of wills only for the purpose of explaining a latent ambiguity, or to rebut a resulting trust: *Avery v. Chappel*, 6 Conn. 270; 16 Am. Dec. 53; *Iddings v. Iddings*, 7 Serg. & R. 111; 10 Am. Dec. 450; *Mann v. Mann*, 14 Johns. 1; 7 Am. Dec. 416; *Taylor v. Maris*, 90 N. C. 619. As between the strict definition of a patent ambiguity and that of a latent ambiguity, this statement of the rule is correct, because extrinsic evidence is not admissible to explain a patent ambiguity on the face of a will: *Breckenridge v. Duncan*, 2 A. K. Marsh. 50; 12 Am. Dec. 359; *Taylor v. Maris*, 90 N. C. 619. The cases and illustrations that we have thus far given in this note show, however, that the term "patent" does not include mere inaccuracy, or such uncertainty as arises from the use of peculiar words, or of common words in a peculiar sense. Extrinsic evidence is clearly admissible, as we have shown, to clear up such inaccuracies and uncertainties. We believe, therefore, that a clearer statement of the exception to the general rule is, that extrinsic evidence is admissible to explain a will

In all cases, except those of patent ambiguity, where, from some obscurity or ambiguity, a difficulty arises in applying the words of a will to the subject matter or beneficiary of a devise: *In re Wells*, 113 N. Y. 396; 10 Am. St. Rep. 457; *Burge v. Hamilton*, 72 Ga. 568.

A latent ambiguity in a will, as to the person or property to which it applies, may be removed by extrinsic evidence. In other words, the person or property to which the will applies may be identified by extrinsic evidence: *Patch v. White*, 117 U. S. 210; *Gilmer v. Stone*, 120 U. S. 586; *King v. Ackerman*, 2 Black, 408; *Jones v. Dove*, 6 Or. 188; 7 Or. 468; *Whitcomb v. Rodman*, 156 Ill. 116; 47 Am. St. Rep. 181; *Eatherly v. Eatherly*, 1 Cold. 461; 78 Am. Dec. 499; *Brownfield v. Brownfield*, 12 Pa. St. 136; 51 Am. Dec. 590; *Eckford v. Eckford*, 91 Iowa, 54; *Gallup v. Wright*, 61 How. Pr. 286; *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Jones v. Quattlebaum*, 31 S. C. 607; *Morgan v. Burrows*, 45 Wis. 211; 30 Am. Rep. 717; *Board of Missions v. Scovell*, 8 Demarest, 516; *Decker v. Decker*, 121 Ill. 341.

A latent ambiguity is only disclosed by extrinsic evidence, and may arise upon a will, either: 1. When it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or 2. It may arise when the will contains a misdescription of the object or subject; as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstances or declarations of the testator. Where it consists of a misdescription, as before stated, if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case, evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will: *Patch v. White*, 117 U. S. 210, per Mr. Justice Bradley, who delivered the opinion of the court; *Eckford v. Eckford*, 91 Iowa, 54. If the name and description in a devise answer in the same degree to each of two objects, the intention is a pure question of fact, and does not depend in any degree on legal direction: *Brownfield v. Brownfield*, 12 Pa. St. 136; 51 Am. Dec. 590. Illustrations of latent ambiguities as to legatees may be found under the head below, which specifically treats of that matter, and illustrations of latent ambiguities raised by misdescriptions in wills, and the admission of extrinsic evidence to explain them may be found farther on in this note, under the head, "Identification of land devised by will."

IDENTIFICATION OF DEVISEE OR LEGATEE.—A mistake in the name of a person to be benefited by a will is not material, if the will shows who was intended by the description; and extrinsic evidence is admissible, in cases of ambiguity or obscurity, to show who was meant: *Phillips v. Ferguson*, 85 Va. 509; 17 Am. St. Rep. 78; *Gilmer v. Stone*, 120 U. S. 586; note to *Brownfield v. Brownfield*, 51 Am. Dec. 594; *Bradley v. Rees*, 113 Ill. 327; 55 Am. Rep. 422; *Hinckley v. Thatcher*, 139 Mass. 477; 52 Am. Rep. 719; *Tilton v. American Bible Soc.*, 60 N. H. 377; 49 Am. Rep. 321; *Hawkins v. Garland*, 76 Va. 149; 44 Am. Rep. 158; monographic notes to *Chambers v. Watson*, 46 Am. Rep. 72, and *Kurtz v. Hibner*, 8 Am. Rep. 669, and illustrations there given; *Griscom v. Evens*, 40 N. J. L. 402; 29 Am. Rep. 251; *Faulkner v. National Sailors' Home*, 155 Mass. 458; *Matter of Cahn*, 3 Redf. 31; *Board of Missions v. Scovell*, 8 Demarest, 516; *Covert v. Sebern*, 73 Iowa, 564; *In re Robb's Estate*, 37 S. C. 19; *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472; *Dunham v. Averill*, 45 Conn. 61; 29 Am. Rep. 642; *Appeal of Washington etc. University*, 111 Pa. St. 572; *Webster v.*

Morris, 66 Wis. 366; 57 Am. Rep. 278; **Brower v. Bowers**, 1 Abb. App. Dec. 214; **Jones v. Dove**, 6 Or. 188; **Appel v. Byers**, 98 Pa. St. 479; **Leonard v. Davenport**, 58 How. Pr. 384; **Taylor v. Tolen**, 38 N. J. Eq. 91; **Powell v. Biddle**, 2 Dall. 70; 1 Am. Dec. 263; **University v. Tucker**, 31 W. Va. 621. A misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision in which it is found, if, either from the will itself or extrinsic evidence, the object of the testator's bounty can be ascertained. If corporations, though foreign, are improperly described in the will, the bequest will not fail, if it is clearly shown, by competent extrinsic proof, what corporations were meant by the description: **Leonard v. Davenport**, 58 How. Pr. 384; **University v. Tucker**, 31 W. Va. 621; **Taylor v. Tolen**, 38 N. J. Eq. 91.

The following illustrations support the rules above stated: Extrinsic evidence is admissible, in construing a will, to show who was intended to receive a bequest given to a person described by a wrong Christian name: **Powell v. Biddle**, 2 Dall. 70; 1 Am. Dec. 263; to show who was the person whom the testator designated by a particular name: **Phillips v. Ferguson**, 85 Va. 509; 17 Am. St. Rep. 78; or to show who was meant, where legacies were given to the testator's nephews, **Harmon Baldwin** and **Joseph Baldwin**, he having a nephew, **Samuel Harbourn Baldwin**, usually called "Harbourn," and a nephew, **Josiah M. Baldwin**, usually called "Josie": **Taylor v. Tolen**, 38 N. J. Eq. 91; or, where the testatrix devised and bequeathed to her "stepson, **H. S. Covert**," certain property, and she had no stepson whose initials were H. S., but did have a step-son named **John Henry Covert**, who was usually called "Harvey," to show that she directed the scrivener to so write the will as to give the property in question to her "stepson Harvey," and that he supposed that Harvey's name was H. S., and so wrote it in the will: **Covert v. Sebern**, 73 Iowa, 564; to show that, by the term, "my daughter **Elizabeth**," used in a will, where the testator had no such daughter, he intended to describe one whom he had adopted as his daughter, although he had not formally adopted her in accordance with the provisions of the statute: **Matter of Cahn**, 3 Redf. 31; to show that a bequest to the testator's namesake "**S. G., son of Captain J. F. S.**," there being no person answering the description, was intended for **S. G., son of Captain J. F. H.**: **Hawkins v. Garland**, 76 Va. 149; 44 Am. Rep. 158; to show what society is meant by "the Bible Society": **Tilton v. American Bible Soc.**, 60 N. H. 377; 49 Am. Rep. 321; or the "Home and Foreign Missionary Societies to aid in propagating the Holy Religion of Jesus Christ": **Hinckley v. Thatcher**, 139 Mass. 477; 52 Am. Rep. 719; or "The American and Foreign Missionary Society," there being no missionary society of that name: **Dunham v. Averill**, 45 Conn. 61; 29 Am. Rep. 642; or the "Sailors' Home in Boston": **Faulkner v. National Sailors' Home** 155 Mass. 458; or "The Canandaigua Orphan Asylum, at Canandaigua, Ontario County, New York," there being no orphan asylum of that name located at Canandaigua or elsewhere, though one named the Ontario Orphan Asylum was located there, and another named the St. Mary's Orphan Asylum: **Bristol v. Ontario Orphan Asylum**, 60 Conn. 472. Where the testator, being a member and officer of the Presbyterian Church, devises the remainder of his estate "to be equally divided between the board of foreign and the board of home missions," and it appears that the Presbyterian Church in the United States of America has a corporate "Board of Foreign Missions" and a corporate "Board of Home Missions," though several other religious bodies in the United States have similar organizations, for the same purposes, there is a latent ambiguity in the will respecting the object of the residuary gift, which ambiguity may be removed by extrinsic evidence: **Gilmer v. Stone**, 120 U. S. 586; **Board of Missions v. Scovell**, 3 Demarest, 516. If two parties claim a legacy, neither of whom bears the name of the legatee in the will, and it is uncertain which is the one intended by the testator, if either, it must be determined by a consideration of all the language used, and by proof of all the facts and surround-

ing circumstances: Appeal of Washington etc. University, 111 Pa. St. 572. A bequest was made to the "Omro and Algoma Union Cemetery Association of Omro." There was no corporation of that name, but there were corporations called respectively the "Omro Cemetery Association" and the "Union Cemetery Association," both having grounds in Omro. The members and incorporators of the latter included inhabitants of the towns of Omro and Algoma. It was held that extrinsic evidence of these facts was admissible, and that the last-named corporation was the one intended: Webster v. Morris, 66 Wis. 366; 57 Am. Rep. 278.

Extrinsic evidence is not admissible to show that the term "nephews" in a will was meant to include illegitimate nephews, unless it appears that there were no legitimate nephews, in which case it would be admissible to explain the ambiguity: Brower v. Bowers, 1 Abb. App. Dec. 214. It is inadmissible to show that the testator intended his illegitimate, and not his legitimate, nephew to be the object of his bounty, where he devised property to his nephew A. B., and died, leaving two nephews of that name, one legitimate, the other illegitimate: Appel v. Byers, 98 Pa. St. 479. So, an illegitimate grandniece cannot come into competition with a legitimate grandniece; as where a testator gave his residuary estate to his "niece E. W." and neither he nor his wife had any niece, though his wife had a legitimate grandniece and an illegitimate grandniece both named E. W. There is no latent ambiguity in such a case, and extrinsic evidence cannot be admitted to show that the illegitimate grandniece was the person intended: In re Fish (1894), 2 Ch. 83.

IDENTIFICATION OF LAND DEVISED BY WILL.—Upon the question as to whether extrinsic evidence is admissible to prove that a testator intended to devise property different from that expressly mentioned in his will, where a mistake has been made therein, there has been much heated controversy, and diversity of opinion among the courts; but this doubtless arises from the difficulty of applying legal principles to the very peculiar blunders that are made in testamentary dispositions of property. With respect to an erroneous devise of land, many of the cases hold that extrinsic evidence is not admissible, except in cases of latent ambiguity. They proceed upon the principle that such evidence is not admissible to supply an omission, or to cure a defect, in a will, occasioned by inadvertence, oversight, or mistake. If the land devised is clearly described, so that the court can see what is meant, as disclosed on the face of the will, the language of the will must be given effect, and if it turns out that the testator did not own the tract devised, the devise must, of course, fail, as no other words than those of the devise can be injected into it, in order to identify property to which the words of description in the will do not apply. So, if a false description of land is rejected, where there is one, and the remaining words do not describe the property to any extent, extrinsic evidence is inadmissible to show what the testator intended to convey: Fitzpatrick v. Fitzpatrick, 36 Iowa, 674; 14 Am. Rep. 538, reviewing many cases; Judy v. Gilbert, 77 Ind. 96; 40 Am. Rep. 289, and monographic note thereto on parol evidence to correct a will; Kurtz v. Hibner, 55 Ill. 514; 8 Am. Rep. 665, and note thereto discussing the subject; McDaniel v. King, 90 N. C. 597; Taylor v. Maris, 90 N. C. 619; Sherwood v. Sherwood, 45 Wis. 357; 30 Am. Rep. 757; Hanner v. Moulton, 23 Fed. Rep. 5; Jackson v. Sill, 11 Johns. 201; 6 Am. Dec. 363; Ehrman v. Hoskins, 67 Miss. 192; 19 Am. St. Rep. 297; Bingel v. Volz, 142 Ill. 214; 34 Am. Rep. 64; Crooks v. Whitford, 47 Mich. 283. The case last cited holds that extrinsic evidence cannot be resorted to for the purpose of supplying a description of land omitted from a devise. Thus, a testator devised to his daughter seventy acres of land off the south side of the northwest quarter of section 16, which he never owned or claimed to own, instead of seventy acres off the south side of the southwest quarter of section 16, which he did own; and the court, in holding that the

description in the will could not, by any rule of construction, be held to mean the land off the south side of the southwest quarter of section 16, and that parol evidence was inadmissible for the purpose of correcting the mistake, said: "If it be admitted that there are repugnant elements in this description, it is impossible to see what repugnant element can be rejected so as to leave a description which will apply to the land which the appellant claims. If we reject the words, 'northwest quarter,' or 'northwest,' or 'north,' what remains does not apply to the land in question. The difficulty of the description, as it appears in the devise, is, that it substitutes 'northwest' for 'southwest,' and the correction of the description, so as to make it apply to the right tract, requires, not only that one of these words should be stricken out, but that the other should be inserted. It involves more than construction; it requires reformation, and in this state, at least, courts of equity have persistently refused to entertain bills to reform wills": *Bingel v. Volz*, 142 Ill. 214; 34 Am. St. Rep. 64. So, parol evidence is inadmissible to show the testator intended to devise land in a different section than that mentioned in the will, and that the draughtsman of the will, by mistake, inserted the wrong numbers. For example, such evidence is not admissible to show that, by mistake, real estate was described in a will as the west half of the northeast quarter, instead of the east half of the southwest quarter, notwithstanding it appears that the testator owned no real estate except the east half of the southwest quarter: *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; 14 Am. Rep. 538; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665. So, extrinsic evidence is not admissible to show that another tract was included. A testator devised: "I give and bequeath to my beloved wife, for and during her widowhood, the farm which I now occupy, together with the whole of the crops of every description, which may be thereon at the time of my death"; and, after her remarriage or death, he devised the same over to another. It was held that parol evidence was inadmissible to show that the testator intended to devise the whole of his real estate at W., and which included a farm of ninety acres held by one under a lease from the testator for seven years; and that he gave such instructions to the attorney who drew the will, as it was a case of mistake, and not of latent ambiguity: *Jackson v. Sill*, 11 Johns. 201; 6 Am. Dec. 363. We do not, however, understand that the above cases excluding extrinsic evidence to explain a mistake in a devise of land, where the will is specific, certain, and clear on its face, are in conflict with those which allow extrinsic evidence to explain a devise which has, upon its face, defects and imperfections of description, but which may be made entirely clear by the admission of such evidence; and, while a will cannot be reformed, yet an estate may pass thereby if, after a false description of land is discarded, the will identifies it sufficiently. The authorities all agree that extrinsic evidence is admissible to apply the subject matter of a devise in the event of there being a latent ambiguity; and, in order to harmonize the cases, it is unnecessary to disturb the general rules, that if property is well described in a will, and there is no ambiguity in the language employed, nor any mistake apparent upon the face of the will, extrinsic evidence cannot be resorted to for the purpose of qualifying, limiting, or aiding the description; and that courts will not change the words of a will by considering extrinsic evidence, unless the instrument itself supplies sufficient evidence of a mistake, or discloses sufficient indications of a latent ambiguity. The distinction between cases of mistake disclosed on the face of a will, and those in which the mistake is not apparent, except by the aid of extrinsic evidence, is clear; and if a careful study of the testator's language, applied to the circumstances by which he was surrounded, discloses an inadvertency or mistake in a description of persons or things in a will, which can be corrected without adding to the testator's language, thus making a different will from that left by him, the correction should be made, and there is no reason or authority for a court to refuse to do it: *Patch v. White*, 117 U. S. 210; *Eckford v. Eckford*, 91 Iowa, 54;

Whitcomb v. Rodman, 156 Ill. 116; 47 Am. St. Rep. 181; Groves v. Culph, 132 Ind. 186; Bingel v. Volz, 142 Ill. 214; 34 Am. St. Rep. 64; Smith v. Dennison, 112 Ill. 367; Burge v. Hamilton, 72 Ga. 568; Cleverly v. Cleverly, 124 Mass. 314; Bradley v. Rees, 113 Ill. 327; 55 Am. Rep. 422; Chambers v. Watson, 60 Iowa, 339; 46 Am. Rep. 70, and monographic note thereto, on imperfect description in will; Jones v. Dove, 6 Or. 188; 7 Or. 467; Eatherly v. Eatherly, 1 Cold. 461; 78 Am. Dec. 499; Pocock v. Redinger, 108 Ind. 573; 58 Am. Rep. 71, and monographic note thereto on mistake of description of land in will; Morgan v. Burrows, 45 Wis. 211; 30 Am. Rep. 717; monographic note to Kurtz v. Hibner, 8 Am. St. Rep. 669-673, on misdescription in will; Peters v. Porter, 60 How. Pr. 422; Black v. Hill, 32 Ohio St. 313; King v. Ackerman, 2 Black, 408; Cox v. Cox, 91 N. C. 256; Horton v. Lee, 99 N. C. 227; Brown v. Brown, 106 N. C. 452.

While words cannot be added to a will, yet, in arriving at the intention of the testator, so much as is false in the description of the land devised may be stricken out, provided enough remains to identify the premises intended to be devised. Extrinsic evidence, in the case of a latent ambiguity in a will, is resorted to, not for the purpose of contradicting or adding to the will, but to determine the existence or nonexistence of such ambiguity, and to enable the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time of its execution. So, if a testator misdescribes his estate as being in different localities from the fact, putting one part in the locality of another, or describes land which he never owned, and sufficient appears upon the face of the will, as applied to the subject matter, to show that such misdescription is a mere mistake, it will not defeat the obvious intention of the testator: Whitcomb v. Rodman, 156 Ill. 116; 47 Am. St. Rep. 181. Again, if a will contains several descriptions, or elements thereof, all of which are necessary to identify the property, it will be void if no property of the testator can be found which will correspond with every part of the description; but if the intention, as gathered from the instrument, does not make it necessary to satisfy all the elements of the description, or if parts of the description are inconsistent with the other parts, and enough of them are consistent to identify the property, whatever is repugnant may be rejected, and the devise enforced under this construction: Bingel v. Volz, 142 Ill. 214; 34 Am. St. Rep. 64. And, if the will itself shows that there has been a mistake in specifically describing land which is also designated by a general description, the will may be made to operate upon the land intended to be specifically described, but which, by mistake, is incorrectly described in the specific description which follows the general. If, however, the language of the will itself does not furnish evidence of mistake, a court cannot interfere, upon the ground that a mistake was made by the testator: Pocock v. Redinger, 108 Ind. 573; 58 Am. Rep. 71, and monographic note thereto on mistake in description of land.

The following cases illustrate these principles, and show what ambiguities in a will may be removed by extrinsic evidence, it being observed that, wherever extrinsic evidence has been admitted to remove a latent ambiguity, the language of the will, after rejecting the false description, has been sufficient to show what property was intended by the testator. Where one item of a will devised the house and lot on which the testator resided, "being parts of lots number 15 and 16," etc., to his wife for life, and a subsequent item devised "the same lot, number 15, so devised to my said wife during her lifetime," to the testator's youngest daughter, and "to her heirs in fee simple forever," there is apparent on the face of the will such a mistake as to justify the introduction of extrinsic evidence to show that the testator intended to devise the same property to his daughter in fee that he had in the previous item of the will devised to his wife for life: Groves v. Culph, 132 Ind. 186. A testator devised land to "the four boys," and parol evidence that he had seven sons, three of whom were adults living in

their own homes, and the other four minors living with him, and his declarations before, at, and after the execution of the will, was held competent to show that the devise was intended for the minors: *Bradley v. Rees*, 113 Ill. 327; 55 Am. Rep. 422. A will devising land described as the north half of the donation claim of Bartholomew Dove may be admitted in evidence, to be followed by extrinsic evidence tending to show that the north half of the donation claim of Bethuel Dove was intended to be devised: *Jones v. Dove*, 7 Or. 468. If a will shows upon its face what property the testator owned; that he intended to dispose of it all, and supposed that he had done so; that he had disposed of it all except one-half of his land; and that there was left in the will an incomplete clause, omitting to state the subject of any gift, but which was plainly intended to be the other moiety of the land, a court of equity will supply the omission, which is apparent upon the face of the paper, and extrinsic evidence is unnecessary to supply it: *Eatherly v. Eatherly*, 1 Cold. 461; 78 Am. Dec. 499. A will described one boundary of a tract of land devised in terms applicable in fact to two different lines, and parol evidence of the testator's intent, including his declarations made when he executed the will, was held admissible to identify the boundary. The case is one of ambiguity, not in the will, but produced by extraneous circumstances. It is a latent ambiguity removable by proof of extraneous facts: *Morgan v. Burrows*, 45 Wis. 211; 30 Am. Rep. 717.

"Speculation lands" disposed of by will may be identified by extrinsic evidence: *Brown v. Brown*, 106 N. C. 451. So, where the testator devises the tract of land on which he lives, parol evidence is competent to show what, in fact, such tract included: *Horton v. Lee*, 99 N. C. 227. The testator having used the phrase "my two farms," such evidence is admissible to show the situation of the land, and the manner in which it had been used and treated, in order to ascertain whether a disconnected piece of woodland was, in fact, a part of one of the "two farms," so as to pass under the devise: *Black v. Hill*, 32 Ohio St. 313.

The testatrix devised two lots "on the southerly side of Forty-ninth street, near Eighth avenue." In construing the will, extrinsic evidence upon the trial of the action showed that the testatrix owned no property on Forty-ninth street, but did own property on One Hundred and Forty-ninth street answering fully, in other respects, the terms of the devise. It was further shown, by such evidence, that persons living above One Hundredth street dropped the "One Hundred" and designated the lot by the remaining figures. There was held to be, in this case, a latent ambiguity as to the subject matter of the devise, explainable by extrinsic evidence, and the devisee under the will took the two lots in question: *Peters v. Porter*, 60 How. Pr. 422. So, if a testatrix owns but one quarter in a given section, and devises another, with the statement that she owns the tract willed, a latent ambiguity arises, and extrinsic evidence may be admitted to show what quarter of the section the decedent owned; and, when shown, that tract will pass by the will: *Eckford v. Eckford*, 91 Iowa, 54, with an able and exhaustive dissenting opinion by Kinne, J. In this case, the description was accurate, except as to that part of the section in which the land was situated, which was false; but the court, after discarding the false description, found remaining in the devise language sufficient to lead to an identification of the land actually owned by the testatrix, and held that this identification might be made by extrinsic evidence. It adhered to the fundamental principle that a false description of real estate in a will cannot defeat the devise, if, after rejecting the false description, there is a sufficient designation or description of the subject of the devise to lead to an identification of the land in controversy. It may be asked what remained in this case after striking out the false description. The answer is, that where there is a false particular description of the devise, the express assertion of ownership in the deviser is in the nature of description, and is sufficient to authorize extrinsic evidence in identification of the land. The most extreme case that we have

found in allowing the introduction of extrinsic evidence to explain a will is *Patch v. White*, 117 U. S. 210. There the testator, after saying, "and touching worldly estate," devised certain specific lots with the buildings thereon, respectively, to each of his near relations, and, among others, to his brother Henry a lot described as "lot numbered 6, in square 403, together with the improvements thereon erected." He then devised to his infant son "the balance of my real estate, believed to be and to consist in lots numbered 6, 8, and 9," etc., describing a number of lots, but not describing lot number 3, in square 406. In construing the will, the court said: "It is clear from the will itself: 1. That the testator intended to dispose of all his estate; 2. That he believed that he had disposed of it all in the clauses prior to the residuary clause, except the specific lots thereby given to his son; 3. That when he gave to his brother Henry lot number 6, in square 403, he believed he was giving him one of his own lots. On general principles, he would not have given him a lot which he did not own; and he expressly says, 'touching worldly estate, wherewith it has pleased Almighty God to bless me in this life, I give, devise, and dispose of the same in the following manner'; 4. That he intended to give a lot with improvements thereon erected.

"Now, the parol evidence discloses the fact, that there was an evident misdescription of the lot intended to be devised. It shows: 1. As above stated, that the testator, at the time of making his will, and at the time of his death, did not, and never did, own lot 6, in square 403, but did own lot 3, in square 406; 2. That the former lot had no improvements on it at all, and was located on Ninth street, between J and K streets, whilst the latter, which he did own, was located on E street, between Eighth and Ninth streets, and had a dwelling-house on it, and was occupied by the testator's tenants—a circumstance which precludes the idea that he could have overlooked it.

"It seems to us that this evidence, taken in connection with the whole tenor of the will, amounts to demonstration as to which lot was in the testator's mind. It raises a latent ambiguity. The question is one of identification between two lots, to determine which was in the testator's mind, whether lot 3, square 406, which he owned, and which had improvements erected thereon, and thus corresponded with the implications of the will, and with part of the description of the lot, and rendered the devise effective, or lot 6, square 403, which he did not own, which had no improvements thereon, and which rendered the devise ineffective.

"It is to be borne in mind that all the other property of the testator, except this one house and lot, was disposed of to his other devisees; at least, that was his belief as expressed in his will, and there is no evidence to the contrary; whilst this lot (though he believed he had disposed of it) was not disposed of at all, unless it was devised to his brother Henry by the clause in question. In view of all this, and placing ourselves in the situation of the testator at the time of making his will, can we entertain the slightest doubt that he made an error of description, so far as the numbers in question are concerned, when he wrote, or dictated, the clause under consideration? What he meant to devise was a lot that he owned; a lot with improvements on it; a lot that he did not specifically devise to any other of his devisees. Did such a lot exist? If so, what lot was it? We know that such a lot did exist, and only one such lot in the world, and that this lot was the lot in question in this cause, namely, lot number 3, in square 406. Then is it not most clear that the words of the will, 'lot numbered 6, in square 403,' contained a false description. The testator, evidently by mistake, put '3' for '6,' and '6' for '3,' a sort of misspeech to which the human mind is perversely addicted. It is done every day, even by painstaking people. Dr. Johnson, in the preface to his dictionary, well says: 'Sudden fits of inadvertence will surprise vigilance, slight avocations will seduce attention, and casual eclipses of the mind will darken learning.' Not to allow the correction of such evident slips of attention,

when there is evidence by which to correct it, would be to abrogate the old maxim of the law, '*Falsa demonstratio non nocet.*'

"It is, undoubtedly, the general rule, that the maxim just quoted is confined in its application to cases where there is sufficient in the will to identify the subject intended to be devised, independently of the false description, so that the devise would be effectual without it. But why should it not apply in every case where the extrinsic facts disclosed make it a matter of demonstrative certainty that an error has crept into the description, and what that error is. Of course, the contents of the will, read in the light of the surrounding circumstances, must lead up to and demand such correction to be made." The court concluded as follows: "In view of what has already been said, there cannot be a doubt of the identity of the lot thus devised. It is identified by its ownership, by its having improvements on it, by its being in a square the number of which commenced with four hundred, and by its being the only lot belonging to the testator which he did not otherwise dispose of. By merely striking out the words 'six' and 'three' from the description of the will, as not applicable (unless interchanged) to any lot which the testator owned, or, instead of striking them out, supposing them to have been blurred by accident so as to be illegible, the residue of the description, in view of the context, so exactly applies to the lot in question, that we have no hesitation in saying that it was lawfully devised to Henry Walker."

A will contained this provision: "As to my real estate, I dispose of it as follows: I own the east half of the northwest quarter," etc., "and I hereby give and bequeath the same to my son," etc. The testator did not own the east half of the northwest quarter, but did own the west half; and it was held that the will should be made to operate upon the land intended: *Pocock v. Redinger*, 103 Ind. 573; 58 Am. Rep. 71. A testator devised to his son "twenty acres off the west half of the northeast quarter of the northeast quarter of section 33, township 18 north, range 11 west," and the evidence showed that he never owned the northeast quarter of the northeast quarter of this section 33, or any part of it, but that he did own the northwest quarter of the northeast quarter of that section. The descriptive words of the subject of the devise being in part false, it was held that there was a latent ambiguity in the devise, and that if, after striking out so much of the description as was false, enough remained in the will, interpreted in the light of surrounding circumstances when the will was made, to identify the premises, the devise would be good. It was reasoned that, by the admission of such extrinsic evidence, no words were inserted in the description which were left out by mistake; that nothing was added to the will; that only the false part of the description was rejected; and that, it being evident that the testator intended to devise land owned by him, lying in the northeast quarter of section 33, township 18 north, range 11 west, and as he owned no land in that quarter, except the northwest quarter thereof, it was clear that he intended to devise the twenty acres off the part of the quarter he owned. The court distinguished this case from that of *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665, where the court was asked to insert or substitute words of description in place of those used, and where, after rejecting that part of the description which was false, there were no words used from which the land could be identified: *Decker v. Decker*, 121 Ill. 341.

HELMAN v. WITHERS.

[3 INDIANA APPEALS, 522.]

REPLEVIN LIES where property has been unlawfully taken, or is unlawfully detained.

REPLEVIN—DETINUE.—The whole ground of both detinue and replevin is now covered by the code provision of Indiana for the recovery of personal property.

REPLEVIN—DEFENSE.—It is no defense to an action of replevin against one who has obtained the possession of the plaintiff's property without right, that the defendant has transferred the possession either before or after the commencement of the suit.

REPLEVIN—DETENTION.—The selling of property to another without right is, in effect, a detention of it from the true owner.

O. T. Chamberlain and P. L. Turner, for the appellants.

H. C. Dodge and J. S. Dodge, for the appellee.

532 NEW, J. This was an action in replevin, instituted and tried in a justice's court, and from there appealed to and tried in the circuit court.

The appellee, in his complaint, avers that he is the owner and entitled to the possession of one bald-face mare, of the value of sixty-five dollars; that the appellants, Tobias K. Helman and Samuel R. Helman, the defendants below, have the possession without right, and unlawfully detain the same from the appellee; and that the said property has not been taken by virtue of any execution, tax assessment, attachment, or other writ of any kind against the appellee. Wherefore judgment is asked for the recovery of said horse, and twenty-five dollars damages for the detention thereof.

In the circuit court, upon the issues joined, there was a trial by jury, and special verdict returned as follows:

"We find that on and prior to the twenty-ninth day of July, 1889, the plaintiff was the owner and in the possession of the mare described in the complaint; that on said day one Arthur Withers took said mare and traded and delivered her to the defendants, Tobias K. Helman and Samuel R. Helman; that said Arthur Withers, in making said trade, was not the lawful agent of the plaintiff; that said trade was not made with the knowledge or consent of the plaintiff; that when the plaintiff was informed of said trade, he did not ratify the same; that, on the second day of August, 1889, and before this action **533** was brought, plaintiff caused a demand for the return to him of said mare to be made on the defendants, Tobias K. and Samuel R. Helman,

which was refused; that before this action was brought, the said defendants had sold and delivered said mare to one David Wise; that said sale was made before said demand was made; that said delivery to Wise was made for the purpose of evading the writ of replevin in this cause, and said delivery was made about one-fourth hour before this action was commenced; that the officer to whom the writ was issued did not succeed in finding said mare, and that the value of said mare is fifty dollars. If, upon the foregoing facts, the law be with the plaintiff, as against either or both defendants, then we find for the plaintiff, and assess his damages at fifty dollars. If the law be with either or both defendants, then we find for him or them."

A motion by the appellants for judgment in their favor, upon the facts found by the special verdict, was overruled. Judgment was then rendered in favor of the appellee upon his motion for the value of the mare as found by the jury, and for costs.

The appellants have assigned as error the overruling of their motion for judgment upon the special verdict, and the sustaining of the appellee's motion for judgment.

The question presented for our decision is, Can the judgment of the circuit court be sustained upon the facts found by the jury?

It is made to appear by the facts found that, on and prior to the 29th of July, 1889, the appellee was the owner and in possession of the mare in dispute, and that on that day Arthur Williams, without right, traded and delivered her to the appellants, who, upon the second day of August, 1889, before this suit was commenced, refused, upon the demand of the appellee, to return to him said mare; that before the commencement of this suit, and before the making of said demand, the appellants sold and delivered said mare to one David Wise for the purpose of evading the writ of replevin ⁵³⁴ issued in this cause; that the value of the mare is fifty dollars.

Counsel for the appellants contend that, inasmuch as the appellants were not in the possession of the mare at the time the action was commenced, the judgment of the court below was erroneous.

The two actions, detinue and replevin, were formerly in use in this state. These two actions, detinue, for an unlawful detention, and replevin, for an unlawful taking and detention, covered the whole ground of deprivation of personal property, so far as the recovery of the specific articles was concerned, and we think an examination of the earlier statutes,

and the definition of detinue and replevin as given at common law, will clearly show that the statutes now in force for the recovery of personal property cover the entire ground of both of those actions: Stats. 1824, p. 337; Rev. Stats. 1831, pp. 305, 424; Rev. Stats. 1838, pp. 372, 475, 476, 477; Rev. Stats. 1843, pp. 697, 732, 896; 1 Chitty on Pleading, 120, 162.

In the case at bar, it is an unlawful detention that is complained of. In detinue, the gist of the action was the unlawful detainer, and, therefore, it was that the action would lie against a person having the wrongful possession of the chattel, although he may have acquired the possession in the first instance lawfully.

Replevin was originally the remedy when goods were unjustly taken and detained. Now, under the code, and in the justice's act, replevin embraces both a wrongful taking and an unlawful detention.

Detinue, at common law, would lie against him who once had, but afterward improperly parted with, the possession of a chattel: 1 Chitty on Pleading, 123; Jones v. Dowle, 9 Mees. & W. 19; Ellis v. Lersner, 48 Barb. 539; Nichols v. Michael, 23 N. Y. 264 (268); 80 Am. Dec. 259; Dunham v. Troy etc. R. R. Co., 3 Keyes, 543; Harris v. Hillman, 26 Ala. 380; Lightfoot v. Jordan, 63 Ala. 224; Harkey v. Tillman, 40 Ark. 551 (555).

⁵³⁵ It is our opinion, also, now that the replevin, under our statutes, embraces detinue, as it was at common law, that a party in the possession of goods, without right, cannot avoid the action of replevin by wrongfully transferring the possession to another, even though the transfer be made before the commencement of the suit. He cannot protect himself by showing that he has wrongfully transferred the property to another.

In this view we are well supported by authority: Nichols v. Michael, 23 N. Y. 264; 80 Am. Dec. 259; Latimer v. Wheeler, 3 Abb. App. 35; Bullis v. Montgomery, 50 N. Y. 352; Manning v. Keenan, 73 N. Y. 45; Drake v. Wakefield, 11 How. Pr. 106; Ross v. Cassidy, 27 How. Pr. 416; Bockway v. Burnap, 16 Barb. 309; Ward v. Woodburn, 27 Barb. 346; Ellis v. Lersner, 48 Barb. 539; Barnett v. Selling, 9 Hun, 236; Sayward v. Warren, 27 Me. 453 (457); Freeman v. Scurlock, 27 Ala. 407; Washington v. Love, 34 Ark. 93; Harris v. Hillman, 26 Ala. 380; Lightfoot v. Jordan, 63 Ala. 224; Schmidt v. Bender, 39 Kan. 437; Gildas v. Crosby, 61 Mich. 413; Briggs v. McEwen, 77 Iowa, 303; Gassner v. Marquardt, 76 Wis. 579; Wells on Replevin, sec. 145; Cobbey on Replevin, sec. 435. The case of Latimer v. Wheeler,

3 Abb. App. 35, is quoted from with approval in *Louthain v. Fitzer*, 78 Ind. 449. See, also, *Wilson v. Rybolt*, 17 Ind. 391; 79 Am. Dec. 486; *Hoke v. Applegate*, 92 Ind. 570.

The delivery of the mare by the appellants to Wise must, from the facts found, be regarded as wrongful to the appellee—a mere subterfuge to withhold the mare from the latter, and to escape liability. The appellants had no title to the property, and could not rightfully deliver it to any other than its owner. They were trying to place the dominion of the property elsewhere than in the owner. If it be said that there was a detention of the property on the part of Wise, it must be said also that the appellants were contributors and participants in that detention. It has been decided that the selling of the property to another, without right, is, in effect, ⁵³⁶ a detention of the property from the true owner: See *Sayward v. Warren*, 27 Me. 453; *Latimer v. Wheeler*, 3 Abb. App. 35.

The judgment is affirmed, with costs.

REPLEVIN lies for the wrongful taking of property, as well as for its wrongful detention. The groundwork of the action is an unlawful detention, whether an unlawful taking has occurred or not; and property wrongfully taken is wrongfully detained until restored to its owner: *Oleson v. Merrill*, 20 Wis. 462; 91 Am. Dec. 428, and note. Detinue and replevin, in their fullest scope, were formerly in use in Indiana, but the whole ground of both these actions is now covered by the code provision for the recovery of personal property: *Wilson v. Rybolt*, 17 Ind. 391; 79 Am. Dec. 486.

COLLINS v. STATE.

[3 INDIANA APPEALS, 542.]

EXECUTION—MORTGAGED PERSONAL PROPERTY—LEVY.—Under a statute authorizing mortgaged personal property to be levied on and sold under execution, the levy is only upon the interest which remains after payment of the security; or, in other words, upon the equity of redemption; but, for the purpose of the levy and sale of such interest, the officer may take possession of the property, as against both the mortgagor and the mortgagee.

EXECUTION—MORTGAGED PERSONAL PROPERTY—DUTY OF OFFICER.—An officer levying on mortgaged personal property must exercise due care for the protection of the mortgagee's interest, and is prohibited, not only from diverting such property from the security of the mortgage, but from doing anything which would have the effect of diminishing its value as such security. If the mortgage has been recorded, he is bound to take cognizance of it without any other notice.

EXECUTION—MORTGAGED PERSONALTY—DUTY AND LIABILITY OF OFFICER.—An officer levying upon mortgaged per-

sonal property and selling it upon execution, the lien of which is junior to that of the mortgage, must hold it until the terms of the mortgage have been complied with by the purchaser, and, if he fails to do so he is liable on his official bond for any damage sustained by the mortgagee.

EXECUTION--MORTGAGED PERSONALTY--CHANGE OF POSSESSION--OFFICER'S LIABILITY.—A complaint in an action on a constable's bond, alleging that a chattel mortgage was given to indemnify the mortgagees against any loss on account of their being sureties on certain notes; that it provided that the mortgagor was bound to pay the notes at a certain time, and contained a further provision that, if the mortgaged property should be levied on, this, as well as default in payment, should entitle the mortgagees to take immediate possession without process of law, and the same should become the absolute property of the mortgagees; that the mortgaged property was levied upon by a constable, and sold to satisfy a judgment against the mortgagor, junior to the mortgage; that the property was delivered to the holders of the junior judgment without the constable requiring the purchasers to comply with the terms of the mortgage; that the mortgage had been duly recorded; that the notes were due and unpaid; and that the mortgagor, the principal on said notes, was wholly insolvent and unable to pay the same, states a good cause of action, though the mortgagees did not pay out anything on account of their suretyship, as this would not be a defense. The constable must be held to know that a liability had accrued to the mortgagees by the terms of the mortgage; and that the purchaser had acquired nothing at the sale except the mortgagor's equity of redemption; and, while he had nothing to do with passing upon the questions involved in the mortgage, it was his duty to hold possession of the property until those questions were settled, and, by sooner surrendering the possession, he did so at his peril.

EXECUTION--LEVY UPON MORTGAGED PERSONALTY--DAMAGES.—In an action upon a constable's bond for levying upon mortgaged personal property and wrongfully allowing it to be removed beyond the reach of the mortgage, the measure of damages is the value of the property, where such value is found to be less than the amount of the debt, but if the value of the property is more than the debt, the amount of the indebtedness furnishes the measure for the amount of damages.

U. J. Hammond, E. S. Rogers, W. A. Cullen, and J. D. Megee, for the appellants.

B. L. Smith, C. Cambern, D. S. Morgan, and D. Morris, for the appellee.

544 **REINHARD, J.** This action was brought by the state, on the relation of Hutchinson, Price, and Green, against the appellant Collins, a constable of Rush county, and the appellant Draper, as his surety on his official bond, to recover damages.

The appellee's relators had a chattel mortgage on certain goods belonging to one William T. Spradling. Collins, as constable, had in his hands an execution against Spradling on a judgment for \$100 in favor of one Jacob Beckner, which execution was junior to the mortgage. He sold the property on the

execution, and, without first requiring the purchaser to comply with the terms of the mortgage, delivered the goods to the latter, who removed them out of the reach of relators' mortgage. The complaint, omitting the caption, is as follows:

"Said plaintiffs complain of said defendants, and say that on the 29th day of February, 1889, said William H. Collins was the duly appointed constable of Posey township, Rush county, Indiana, and on the 5th day of March, 1889, he was duly qualified and commissioned as such constable, with said defendants Draper and Glass as his sureties in the sum of \$1,000, a copy of which bond is filed herewith, marked 'Exhibit A'; that on the 8th day of July, 1889, one William T. Spradling executed to these relators a mortgage on a certain stock of hardware, situate in a store-room on lot No. 6, in J. W. Green's first addition to the town of Arlington, Indiana, to indemnify them as his sureties on two notes for \$100 and \$125, payable to one Jacob Beckner, which mortgage was duly recorded in the county where the mortgagor resided, on the 8th day of July, 1889, in chattel mortgage record of said county of Rush, No. 23, on pages ⁵⁴⁵ 242 and 243, a copy of which mortgage is filed herewith, marked 'Exhibit B.'

"Plaintiffs further say that said mortgage bears date of 5th day of April, 1889, but the same was not delivered to plaintiffs, nor accepted by them, until the said 8th day of July, 1889, the day the same was recorded; that the mortgage contained the stipulation that should said Spradling pay said notes at maturity, then said mortgage should be void, otherwise to remain in force, and the further stipulation that said Spradling shall retain possession of said goods until said notes become due; and, if said notes are not paid promptly at maturity, said relators should have the right to take possession of same, and the same should become the absolute property of said relators. And relators say that said Spradling did not pay either of said notes at maturity, but has failed and refused to pay any part thereof, though both of said notes became due long before the beginning of this suit

"They further say said Spradling is wholly insolvent, and judgment on said \$100 note was rendered against these relators as such sureties by the Rush circuit court, on the 31st day of March, 1890, for \$104, and \$24 costs, and suit is now pending on said \$125 note in said court.

"Relators further say that, after the recording of said mortgage, the said Spradling confessed a judgment in favor of Hildebrand & Fugate on an account before Willis D. Collins, justice of the peace for said Posey township, for \$100, upon which judgment

an execution was duly issued and placed in the hands of said Collins, as constable of said township; that thereupon said Collins levied upon the goods described in relators' mortgage, and advertised the same for sale on the — day of September, 1889; that thereupon, on said day, said Collins, as such constable, sold said goods so mortgaged to these relators to said firm of Hildebrand & Fugate, who bid the amount of their said judgment, and thereupon, over the written notice and protest of these relators, ⁵⁴⁶ delivered said goods to said firm of Hildebrand & Fugate, who immediately took the same out of said county and converted them to their own use. They became wholly lost to these relators, whereby relators further say said goods so mortgaged to them, and so sold by said Collins to said Hildebrand & Fugate, were of the value of \$400, and said Collins wholly failed and refused to require said purchasers to comply with the terms of relators' said mortgage, but then and there unlawfully, negligently, and carelessly, and without any regard to the conditions of his bond, and in breach thereof, and disregarding his duty as such constable, then and there diverted the same from the security and payment of said notes, and then and there unlawfully delivered said mortgaged goods to said firm of Hildebrand & Fugate, to the damage of the relators in the sum of \$300, for which they demand judgment, and for all other proper relief."

Copies of the constable's official bond declared upon, and of the mortgage or bill of sale referred to in the complaint, are filed as exhibits with the same.

The bill of sale or mortgage reads as follows:

"Know all men by these presents that William T. Spradling, of Rush county, in the state of Indiana, have this day bargained and sold, and do hereby bargain and sell, unto Robert Hutchinson, Elihu Price, and J. C. Green, of Rush county, for the sum of two hundred and twenty-five dollars, to him in hand paid, the receipt whereof is hereby acknowledged, the following described personal property, to wit: The stock of hardware, situate in storeroom on lot No. 6 in J. W. Green's addition to Arlington, Indiana. This indenture is to indemnify the mortgagees as sureties for the mortgagor to Jacob Beckner, as herein specified hereafter.

"The condition of this bill of sale is, that whereas the said William T. Spradling is indebted to said Jacob Beckner in the sum of two hundred and twenty-five dollars, evidenced by his promissory notes dated January 23, 1889, payable September 1st and December 25, 1889, after date, without ⁵⁴⁷ any relief

from valuation or appraisement laws, said notes being for the sum of one hundred and one hundred and twenty-five dollars: Now, if the said William T. Spradling shall well and truly pay said notes at maturity, with all interest due thereon, then this instrument shall be void, otherwise to remain in force. It is agreed and understood by the parties hereto that said William T. Spradling shall retain possession of said property hereby sold until said notes hereby secured become due, and, if said notes are not paid promptly at maturity, said Robert Hutchinson, Elihu Price, and J. C. Green shall then have the right to take and keep possession of said property, wherever it may be found, without any process of law, and the same shall become the absolute property of said Robert Hutchinson, Elihu Price, and J. C. Green, and the said William T. Spradling hereby expressly agrees not to remove said property from the place where it now is without the consent of said Robert Hutchinson, Elihu Price, and J. C. Green, nor to sell, assign, or lease the same without such consent; to use such property well, keep the same insured in some reliable company, and in good repair, and, in case of default being made in any one of these conditions, or if the property shall be levied on by execution from any court, or shall come into the hands of any administrator, guardian, executor, assignee, trustee, or commissioner to be sold, then, and in either of such cases, the mortgagees shall have the right to take immediate and unconditional possession of the same for their own use forever.

“Witness my hand and seal this 5th day of April, 1889.

(Signed) “WILLIAM T. SPRADLING.”

Then follows the acknowledgment.

To the complaint the appellants each separately demurred, and, as a cause of demurrer, alleged that said complaint did not state facts sufficient to constitute a cause of action. The demurrers were each overruled, and the appellants excepted. Issues were joined, the cause was tried by the court, and there was a finding and judgment for the appellee against ⁵⁴⁸ the appellants in the sum of \$240.65, this being the amount of the indebtedness for which the appellee's relators were bound as sureties, with interest.

The appellants moved for a new trial, assigning, as a cause therefor, that the finding was excessive. The motion having been overruled, the appellants again excepted, and hence this appeal.

The overruling of the demurrers and of the motion for a new trial are assigned as error. We shall notice these in their order.

First, then, was the complaint sufficient to withstand the demurrer? It is provided by statute as follows: "Goods and chattels pledged, assigned, or mortgaged as security for any debt or contract, may be levied upon, and sold on execution against the person making the pledge, assignment, or mortgage, subject thereto, and the purchaser shall be entitled to the possession, upon complying with the conditions of the pledge, assignment, or mortgage": Rev. Stats. 1881, sec. 722.

Under this provision of the statute, it has been frequently decided that when property thus mortgaged, pledged, or assigned is levied on, the levy is only upon the interest which the mortgagor has in such property after the payment of the mortgage, etc., or, in other words, upon the equity of redemption, but that, for the purpose of the levy and sale of such interest, the officer may take the property in possession as against both the mortgagor and the mortgagee: *Sparks v. Compton*, 70 Ind. 393; *Hackleman v. Goodman*, 75 Ind. 202; *Louthain v. Miller*, 85 Ind. 161; *Slifer v. State*, 114 Ind. 291; *McDaniel v. State*, 118 Ind. 239.

But, while this right to take the property in possession on the part of the officer has been thus fully recognized, it is true, also, that it is the duty of such officer to exercise due care for the protection of the interest of the mortgagee in the property, and that he is prohibited, not only from diverting ⁵⁴⁹ such property from the security of the mortgage, but from doing anything which has the effect of diminishing its value as such a security: *Syfers v. Bradley*, 115 Ind. 345. And if, in such case, the mortgage has been duly recorded, the officer is bound to take cognizance of the same without any other notice: *McDaniel v. State*, 118 Ind. 239.

In the case just cited, it is also held that an officer who levies upon property thus mortgaged, and sells it upon an execution, the lien of which is junior to that of the mortgage, must hold it until the terms of the mortgage have been complied with by the purchaser, and, if he fails to do this, he is liable on his official bond for any damage sustained by the mortgagee.

With these principles so well settled by the decided cases, it would seem to admit of but little difficulty to arrive at a correct and proper solution of the question before us. We think it inevitable that the action of the trial court must be sustained unless the principles involved in the case at bar form some exception to the general doctrine enunciated in the cases cited. This we understand the appellants to concede, but their counsel

claim that such an exception does exist here, in the fact that the relators have not yet lost anything by reason of their suretyship, as disclosed by the complaint.

The instrument relied upon is an indemnity mortgage, given to indemnify the relators against any loss on account of their being sureties on certain notes. It seems that as between the mortgagor and mortgagee, at least, the authorities make some distinction between mortgages purely indemnifying in their provisions, and those containing a promise, or condition, binding the mortgagor to the payment of the debt. In the former class, there can be no recovery until the mortgagee has actually paid the debt for which he is surety; while in the latter, the mortgage may be foreclosed whenever the principal makes default in the payment of the debt, without reference to whether the mortgagee has actually paid out anything or not. In such cases, the failure to ⁵⁵⁰ pay on the part of the mortgagor, when the debt is due, is held to constitute the breach in the condition of the mortgage, and the mortgagor may proceed at once to make the money out of the mortgaged property, and apply it to the payment of the debt for which he is liable as surety: *Catterlin v. Armstrong*, 101 Ind. 258; *Reynolds v. Shirk*, 98 Ind. 480; *Bodkin v. Merit*, 86 Ind. 560; *Strong v. Taylor School Tp.*, 79 Ind. 208; *Gunel v. Cue*, 72 Ind. 34; *Devol v. McIntosh*, 23 Ind. 529; *Johnson v. Britton*, 23 Ind. 105; *Weddle v. Stone*, 12 Ind. 625; *Loyd v. Marvin*, 7 Blackf. 464; *Brandt on Suretyship*, 2d ed., sec. 221, et seq.

In some degree, we think, these principles may be applied to suits of the character of the one under consideration, the officer, for the time being, occupying the position of the debtor.

An examination of the mortgage in this cause will disclose that by its condition Spradling was bound to pay the notes upon which the relators were sureties at a time certain, viz., January 23, 1889, and December 25, 1889, respectively. This condition, we think, makes the instrument more than a strictly indemnifying contract.

In the case of *Devol v. McIntosh*, 23 Ind. 329, the court, quoting approvingly from *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359, says: "When the instrument deviates the least from a simple contract to indemnify against damage, even where the indemnity is the sole object of the contract, and where, in consequence of the primary liability of other persons, actual loss may be sustained, the decisions of our courts, although by no means uniform, have gradually inclined toward fixing the rule to be

one of actual compensation for probable loss; so that, in contracts of that character, it may now be considered a general rule, both in this country and in England."

The bill of sale in the present case permits the mortgagor to retain the possession until default be made in payment. It also provides that if the mortgaged property shall be levied on, etc., this, as well as a default in payment, shall entitle ⁵⁵¹ the mortgagees to take immediate possession without process of law, and the same shall become the absolute property of the mortgagees.

These conditions had been broken at the time of the sale; at least, the one in reference to a levy by an officer had been broken. The mortgagees were therefore entitled to the immediate possession. The constable knew of the existence of the mortgage, and of its terms. He knew it, as the complaint avers, from actual information and notice, and the law conclusively presumes that he knew it from the records.

By the terms of the mortgage, the mortgagees had also become the holders of the legal title to the property: *Lee v. Fox*, 113 Ind. 98; *Ross v. Menefee*, 125 Ind. 432.

In addition to these facts, it is averred that the mortgagor and principal of the notes is wholly insolvent and unable to pay the debt. The liability of the relators to pay the debt for which they were sureties is therefore fully shown by the averments of the complaint, which the demurrer admits. Where this is the case, the mortgagee need not wait, before he can maintain his action, until he has paid the debt or incurred actual loss: *Walling v. Lewis*, 119 Ind. 496; *Brandt on Suretyship*, 2d ed., sec. 221.

If this were an action, therefore, between the mortgagees and the mortgagor to foreclose the mortgage, there can be no doubt but that the right to foreclose would be fully established.

The appellants insist, if we understand their counsel correctly, that the rules, as between mortgagor and mortgagee, of an indemnity mortgage cannot be applied in measuring the liability of an officer charged with the commission of a tort; and that as to such officer there can be no recovery on his official bond until it has been shown that the party complaining has been actually damnified.

We cannot see, however, upon what principle the officer can be held as exempt. He was expressly forbidden by law, as we have seen, from delivering the property until the terms ⁵⁵² of the mortgage had been complied with: *Syfers v. Bradley*, 115 Ind. 345; *McDaniel v. State*, 118 Ind. 239. He must be held to know that a liability had accrued to the mortgagees by the

terms of the mortgage. He must be held to know that the purchaser had acquired nothing by the sale except the mortgagor's equity of redemption, and that the relators had the primary right of possession, the legal title to the property, and the right to apply the same to the payment of the debt for which they were sureties, and that, if anything belonged to the purchaser, it was only what was left of the proceeds after the said debt had been paid, unless the purchaser himself would then and there pay said mortgage debt. His knowledge of these facts made it a breach of his official duty to allow the property to be removed beyond the reach of the mortgage. This breach of duty makes him liable on his bond. The fact that the mortgagees have paid out nothing as yet is no defense to the action, any more than it would be a defense to the foreclosure of the mortgage.

It is true that he has nothing to do with deciding upon the validity of the mortgage or passing upon the questions involved in its terms as between the parties, but he must hold the possession of the goods until those questions have been settled, and if he surrenders it sooner he does it at his peril: *McDaniel v. State*, 118 Ind. 239. We think, therefore, that the facts pleaded disclose a valid cause of action, and the demurrer was properly overruled.

The remaining question arises upon the overruling of the motion for a new trial. It is urged that the amount of the finding is excessive. The court, as we have seen, adopted as the measure of damages the amount of the debt to secure which the mortgage was given.

The value of the property was proved to be greater than the amount of such debt. The smallest value placed upon it by any witness was \$375. Less than this the court could not have found it to be. Where the value of the property ⁵⁵³ is found to be less than the amount of the debt, the measure of damages is such value of the property; while if the value of the property is more than the debt, the amount of the indebtedness furnishes the measure for the amount of the damages: *Slifer v. State*, 114 Ind. 291.

Tested by this rule, the court correctly placed the damages at \$240.65, the principal and interest of the notes for which the relators are liable.

We find no error in the record.

Judgment is affirmed.

LEVY OF EXECUTION ON MORTGAGED PERSONAL PROPERTY.—The law on this subject does not seem to be well settled. Equitable interests are not generally subject to execution: Note to

Harris v. Alcock, 32 Am. Dec. 167; and this applies to a debtor's equitable interest in personal property: Rose v. Bevan, 10 Md. 466; 69 Am. Dec. 170. A statute authorizing a sale of the interest of a pledgor or mortgagor on execution does not authorize an attachment of such interest; and a mortgagor of chattels, without right of possession, has been held to have no legal interest which can be sold under a statute providing that when personal property is pledged by way of mortgage or otherwise, the pledgor's right and interest may be sold on execution against him: Tannahill v. Tuttle, 3 Mich. 104; 61 Am. Dec. 480. Whether a mortgagor of a chattel has such an estate therein as is subject to levy and execution sale is not settled in South Carolina: McKnight v. Gordon, 13 Rich. Eq. 222; 94 Am. Dec. 164. In New Jersey, it is held that the interest of a mortgagor in mortgaged chattels in possession of the mortgagee may be levied upon under execution, but they cannot be taken from the mortgagee without an offer to pay the mortgage debt. The officer may advertise the interest of the mortgagor for sale, and, on the day of sale, he may require the mortgagee to expose the property to the view of bidders, and enforce obedience to that duty on the part of the mortgagee by virtue of his writ. Hence, if a sheriff, with notice of the mortgagee's claim, attaches the entire mortgaged property, and it is subsequently sold by the auditor in attachment, the sheriff is liable to the mortgagee for the mortgage debt: Fox v. Cronan, 47 N. J. L. 493; 54 Am. Rep. 190. The cases, however, are more uniform in support of the proposition, that after condition broken, mortgaged chattels, whether in possession of the mortgagor or of the mortgagee, are not subject to levy and sale under execution at the instance of the mortgagor's creditors: Ex parte Lorenz, 32 S. O. 365; 17 Am. St. Rep. 862, and note; Manchester v. Tibbetts, 121 N. Y. 219; 18 Am. St. Rep. 816; Leadbetter v. Leadbetter, 125 N. Y. 290; 21 Am. St. Rep. 738.

CASES
IN THE
SUPREME COURT
OF
INDIANA

CLAPP v. HADLEY.

[141 INDIANA, 28.]

MORTGAGES—FORECLOSURE—DISTRIBUTION OF SURPLUS.—A mortgagee holding two mortgages on the same land against the same mortgagor, and a certificate of purchase under a foreclosure sale of the second mortgage, at which he bid the amount of the principal, interest, and costs, is entitled to a lien for the payment of the amount secured by such mortgage upon the surplus arising from a subsequent sale under the first mortgage, although the decrees foreclosing the mortgages were obtained at the same time, without provision made in either for the distribution of any surplus arising from a foreclosure sale.

L. H. Wrigley and L. W. Walker, for the appellant.

T. M. Eells and H. G. Zimmerman, for the appellees.

²⁸ **HACKNEY, J.** The appellee executed two mortgages of a tract of land in Noble county, one in the year 1871 and the other in the year 1886. These mortgages were held by the appellant, one as mortgagee and the other as assignee, when, on the twenty-third day of May, 1893, he procured separate decrees foreclosing them. Neither decree, so far as appellant's allegations disclose, made any reference to the other or any order concerning the distribution of the surplus arising from sales upon such decrees.

On the twenty-fourth day of June, 1893, the appellant purchased under the junior mortgage decree for the full ²⁹ amount of the principal, interest, and costs, and, upon payment of the costs only, he secured a receipt for the amount of his bid and a certificate of purchase.

Later, and on the first day of July, 1893, at a sale upon the senior mortgage decree, the appellant became the purchaser of

said lands for the sum of twelve hundred and twenty-one dollars and thirty-two cents in excess of the principal, interest, and costs of said decree. This surplus Hadley sued to recover, and the appellant intervened by cross-complaint, setting up the foregoing facts, and alleging the insolvency of Hadley and that the lands were worth less than the sum of the two mortgages. The court sustained a demurrer to said cross-complaint, and that ruling presents the only question necessary to our decision.

It will be observed that the legal title to the mortgaged property was in Hadley, and, if the transactions stated constituted a satisfaction of the liens involved in the mortgages, decrees, and purchases, there would be little doubt that the appellee was entitled to the surplus. It is so provided by statute: Rev. Stats. 1894, sec. 1118; Rev. Stats. 1881, sec. 1104; *Firestone v. State*, 100 Ind. 226.

As to the senior mortgage and decree, there is no question but that they were satisfied, so far as they created any liability against the appellee, and the sale under that decree divested all interest of the appellee in the property, excepting the right of redemption and the possible right to the surplus. Treating the appellant's rights under the two mortgages, decrees, and sales as distinct each from the other, and as if held by different persons, there is and can be no question but that the sale under the senior decree cut off and thwarted every right of the purchaser under the junior decree, so far as the land was concerned, save only the possible right of redemption. As to these rights of redemption, we are not concerned, ⁸⁰ but, by the concession of these considerations, we have but the remaining inquiry as to the extent of interest in or lien upon the surplus fund, if any, which the holder of the junior certificate had as against the appellee. Was the purchase under the junior decree effective to satisfy the appellee's debt secured by the junior mortgage and bring him within the statutory provision as to the surplus? Certainly not, if we regard the purchase under the senior decree as extinguishing any claim under the junior purchase which could ripen into title.

To hold the debt satisfied is to conclude that the land, worth less than the amount of the combined debt, has sold for a sum sufficient to satisfy the whole debt, with twelve hundred and twenty-one dollars and thirty-two cents in addition, or, that the appellee has paid the combined debts with property not to exceed the value of such debts, and that he has twelve

hundred and twenty-one dollars and thirty-two cents overplus. Looking to the appellant's situation to learn if his credits have been discharged, we find that the senior decree is satisfied, and that, instead of having received property, or interest that may ripen into property, to be held in satisfaction of the junior mortgage, he has an empty and fruitless certificate of purchase, made so by the satisfaction of the senior debt. Nor can it be said that the appellant, having bid in the property upon the junior decree, and receiving a certificate of purchase, thereby extinguished all liens theretofore existing by virtue of his mortgage and decree.

In the recent and well-considered case of *Robertson v. Van Cleave*, 129 Ind. 217, it was held that the holder of a certificate of purchase under a junior lien was not an owner, but that he was a lienor with the judgment, under which he purchased as the basis of his lien: See, also, *Jewett v. Tomlinson*, 137 Ind. 326.

We conclude, therefore, that appellant's junior lien ⁸¹ was not extinguished, as against the appellee, though it was required to surrender priority to the senior decree and purchase. After this surrender of priority, to what, if anything, did the lien attach? If there had been other and still younger liens, their holders could not, in good conscience, have asked to supersede the appellant's junior lien in the distribution of the surplus arising from the sale under the senior lien. Nor would it appear that the appellee, whose debt remains unpaid, could, with better conscience, ask to take the fund, that which was the result of the property mortgaged for the payment of that debt. We answer, therefore, that equity must attach that lien to the surplus fund, and that, for the enforcement of the lien, the fund is the property mortgaged.

In *Habersham v. Bond*, Ga. Dec., pt. 2, 46, it was held that the lien of a junior mortgage is destroyed by a sale under the foreclosure of an elder one, but that the junior mortgagee has an equitable claim to the surplus arising from the sale, after satisfying the elder mortgage.

In *Hart v. Wingart*, 83 Ill. 282, the purchaser under a junior lien was held to be entitled to the surplus fund arising from a sale in satisfaction of the senior lien.

In *West v. Shryer*, 29 Ind. 624, it was held that a junior mortgage was entitled to participate in the surplus arising from the satisfaction of a senior mortgage, where such surplus was claimed by attaching creditors, whose liens were, in point of time,

subsequent to that of the junior mortgage. The lien was thus carried to the surplus, when the property had been taken out of the reach of the junior lien by applying it to the senior lien.

If an heir mortgage his interest in the land inherited, and the land is sold by the administrator for payment of the estate's debts, the lien of the mortgage is not defeated,³² but is transferred to the balance of the fund after paying such debts: *Ball v. Green*, 90 Ind. 75. See, also, *Koons v. Mellett*, 121 Ind. 585, where it is held that a judgment against a devisee of lands, afterward sold to pay debts, follows the proceeds of the sale, and binds such proceeds to the same extent that it bound the land. To the same effect is *Ballenger v. Drook*, 101 Ind. 172.

The same principle has been applied where the mortgaged real estate has been diverted from the lien by condemnation proceedings, and equity has transferred the lien to the fund awarded as damages: *Sherwood v. Lafayette*, 109 Ind. 411; 58 Am. Rep. 414.

If, instead of selling the entire property upon the senior decree, a fractional part of it had been sold for a sum sufficient to pay the senior debt, there could then be no doubt that the remaining property would have continued subject to the junior purchase, with no interest to the appellee therein, excepting in the right of redemption. It would seem, therefore, that the whole property, equitably the property of the appellant, having been sold and swept from him, he should have a just claim to that part of the proceeds not essential to the satisfaction of the senior lien. To him it stands in place of so much of the property as was not necessary to meet the elder mortgage.

Appellee's learned counsel argue that the purchase under the junior decree was presumably upon the theory that the appellant regarded the property as of sufficient value to pay the senior debt in addition to the amount bid upon the junior debt. In *Myers v. O'Neal*, 130 Ind. 370, such presumption, if it exist, is held not conclusive. But, however this may be, we cannot bring ourselves to the conclusion that equity will permit the debtor to take the fund which is the result of property pledged to the³³ security of a debt not satisfied, and, by reason of his insolvency and his adverse claim to said fund, deprive the creditor of all means of collecting the indebtedness.

It is argued, also, that the appellant having been a party to each decree, and having failed to preserve, by order of the court, his claim to any surplus, he is now precluded. We have no statute requiring the decree to declare the order of distribution of any surplus, and the usual practice is to direct that any surplus

remaining shall be returned for distribution, as the court may direct. We have no statute prescribing the method or practice in enforcing distribution and in determining the interests of lienholders therein. At the time of the foreclosure, it cannot be known that there will be a surplus, nor can it be known that, when a surplus is found, it should be distributed to a particular person, since the then owner of the equity of redemption may not be such owner when the time for distribution arrives. In *Habersham v. Bond*, Ga. Dec., pt. 2, 46, it was expressly held that, though a statute permitted distribution upon motion, if the rights of the parties were not clear and free from dispute, resort to equitable remedies was not only the proper but necessary course.

In *Purviance v. Emley*, 126 Ind. 419, the principle here contended for by the appellant was recognized. There *Purviance* was a junior lienholder and a defendant to the foreclosure of the senior lien, with no order as to the distribution of surplus. The decree directed the two-thirds of the land to be first offered, reserving the inchoate interest of the debtor's wife. This offer was insufficient, and a sale of the whole of the lands secured a surplus, less than the value of one-third of the land.

This court said: "If any part of it belongs to *Sexton Emley* [the debtor], appellant is entitled to have it applied, ²⁴ so far as it will go, to the payment of his judgments."

If the junior mortgagee had been a party defendant in the proceeding to foreclose the senior mortgage, and the decree had barred his equity of redemption, he, nevertheless, would have been entitled, in an independent suit, to foreclose his junior mortgage: *Coleman v. Witherspoon*, 76 Ind. 285.

As we have already said, there is no question in this case as to the appellant's right of redemption, and, as we have seen, it does not appear that any right or equity under the junior mortgage was abridged by the senior decree, either expressly or by implication. Nor was an issue made by the appellee under which the conflicting interests of himself and the appellant could have been adjudicated. As between the mortgagees, no issue could be presumed to have been raised affecting the ultimate distribution of a surplus between either and the mortgagor. The decrees were concurrent in time, and the only advantage possessed by either is in the seniority of the elder mortgage.

If we treat the equity of redemption under the junior mortgage as foreclosed, and all possible conflict settled as between the two mortgages, we are yet unable to observe how the appellee may profit by this conclusion, to the extent either of canceling

a debt not paid or standing upon an adjudication between mortgagees as in his favor for any surplus arising from the senior decree.

We conclude, therefore, that the circuit court erred in sustaining the appellee's demurrer to the appellant's cross-complaint, and the judgment is reversed, with instructions to overrule said demurrer.

PAYMENTS—APPLICATION OF—MORTGAGE OVERPLUS.—A provision in a mortgage that the net proceeds of any sale made thereunder shall be applied to the payment of the mortgage debt, and any overplus returned to the mortgagor, is not a direction by him to apply such overplus to the payment of any particular debt, and the mortgagee may apply it to any other claim held by him against the mortgagor: *Baum v. Trantham*, 42 S. C. 104; 46 Am. St. Rep. 697. See, also, the extended note to *Wygat v. Bigelow*, 16 Am. St. Rep. 501.

PITTSBURGH, CINCINNATI, CHICAGO, AND ST. LOUIS RAILROAD COMPANY v. SULLIVAN.

[141 INDIANA, 88.]

CORPORATIONS—LIABILITY FOR WILLFUL ACT OF AGENT.—A corporation is responsible for the acts of its agent performed while engaged in the discharge of duties within the general scope of his agency, although the particular act was willful, and not directly authorized.

LIABILITY FOR AGENT'S WRONGFUL ACT.—A corporation intrusting a general duty to an agent is liable to an injured person for damages flowing from the agent's wrongful act, done in the course of his general authority, although, in doing the particular act, the agent may have failed in his duty to his principal, and disobeyed his instructions.

PLEADING.—A COMPLAINT MUST BE CONSTRUED upon the theory most clearly outlined by the facts stated therein.

RAILROADS—DUTY TO FURNISH SURGEON AND LIABILITY FOR HIS ACTS.—A railroad company is under no legal obligation to provide surgical aid for its injured employes. If it does so, voluntarily and gratuitously, its liability cannot be extended beyond its negligence, if any, in the selection of a surgeon.

RAILROADS—LIABILITY FOR SURGEON'S NEGLIGENCE. A railroad, voluntarily assuming to employ medical aid for its injured employes, is bound only to exercise reasonable care and diligence to employ a competent physician or surgeon, but is not required to select one of the highest skill or longest experience. If it exercises this required care and diligence, its duty terminates; and it is not liable for the subsequent malpractice or wrongs of such physician or surgeon, committed in or about the treatment of the servant.

N. O. Ross, G. W. Funk, and B. C. Moon, for the appellant.

D. H. Chase, for the appellee.

⁸⁴ JORDAN, J. The appellee brought this action to recover damages against the appellant (a railroad corporation engaged in

the business of a common carrier) for "unlawfully, wrongfully, and unnecessarily amputating appellee's right arm."

The principal errors assigned in this court are: 1. Overruling demurrer to complaint; 2. Sustaining demurrer to second paragraph of answer; 3. Overruling a motion for judgment in favor of appellant upon the special verdict of the jury. The complaint, *inter alia*, alleges: "That on November 21, 1891, the appellee was a servant of appellant, engaged as a brakeman; that while at the station of Red Key, in Jay county, Indiana, in making a coupling, his right arm was accidentally caught, crushed, and injured; that immediately after plaintiff's said injuries, he was taken by the servants of said defendant to the office of one Dr. G. W. Fertich, being then and there one of a number of physicians employed by the defendant to ⁸⁵ render medical and surgical assistance to the servants and employes of said defendant while engaged in their respective duties as such employes and servants; that immediately after plaintiff's arrival at said Dr. G. W. Fertich's office for medical and surgical treatment, said G. W. Fertich proposed to give the plaintiff chloroform, in order to render plaintiff insensible to and unconscious of pain while his said hurts and injuries were being examined and treated; that before plaintiff consented to take said chloroform, he informed said Dr. G. W. Fertich that he would not take chloroform, unless he, said Dr. G. W. Fertich, would promise plaintiff that his arm should not be amputated while he was under the influence of chloroform and insensible and unconscious therefrom; that thereupon said Dr. G. W. Fertich promised plaintiff that he would not amputate and cut off plaintiff's injured arm, and plaintiff, relying on such promise, consented to, and did then and there, take chloroform, and became then and there unconscious and helpless from the effects thereof, said chloroform being then and there administered to plaintiff, by the order and direction of said Dr. G. W. Fertich, by his assistant, one Dr. Shepherd; that while plaintiff was then and there insensible, unconscious, and helpless from the effects of said chloroform, the said Dr. G. W. Fertich did then and there wrongfully, unlawfully, and unnecessarily cut off the plaintiff's right arm about six inches above the elbow; that by reason of the unlawful, unnecessary, and wrongful act of said Dr. G. W. Fertich, in amputating and cutting off plaintiff's right arm as aforesaid, plaintiff suffered great bodily and mental anguish and pain, and is now suffering great pain of body and mind; that plaintiff has thereby been rendered totally incapacitated from doing manual labor, and permanently injured physically in his

means of livelihood and support, ⁸⁶ and that, at the time of his injuries complained of, there was no good or sufficient reason or cause, in fact, or in the science of medicine and surgery, for the amputation of plaintiff's said arm; that plaintiff's said arm could and would have been saved to him by competent and ordinarily skillful medical and surgical treatment."

To this complaint, after having unsuccessfully assailed it by a demurrer, appellant filed an answer in two paragraphs. The first was a denial, and the second was as follows :

"And for a second and further answer, the defendant says, that at the time complained of, it owed the plaintiff no duty, nor was it under any legal obligations to furnish him the services of a physician or surgeon to treat him for the injury stated in his complaint; that at the time complained of, G. W. Fertich, of Dunkirk, in Jay county, Indiana, was employed by the year to give and render services as a physician and surgeon to persons injured upon the defendant's road, whether employes or others, which services were gratuitous to the persons receiving them, and were provided for the exigencies of each case, temporarily, until the patient could be removed, or otherwise provided for, and that such services could be accepted or refused by each person at his own pleasure. And the defendant further says, that in the selection and employment of said Fertich, for the purposes aforesaid, it used due care to procure a skillful and competent surgeon and physician, and believes him to be such, and if incompetent or incapable, in any respect, it had no knowledge of the fact at the time of his employment or since; and that he was the most competent and skillful surgeon and physician in that locality. And the defendant further says, that if said Fertich made any promise or agreement with the plaintiff, as charged in ⁸⁷ the complaint, it was outside his duties under said employment and not authorized by the defendant."

A demurrer was sustained to this second paragraph of answer, and appellant excepted.

The contentions of the learned counsel for the appellant are: 1. That the complaint is not sufficient to entitle appellee to recover against appellant; 2. That the second paragraph of answer was a defense to the complaint; 3. That the gravamen of the complaint is that of malpractice upon the part of Fertich, the physician, and for such appellant is not liable in damages; 4. That the complaint does not allege that Fertich was an agent of plaintiff, nor do the averred facts sustain such an assumption; nor do they show that a duty, by virtue of any law or contract, existed, upon the part of appellant, to furnish to appellee the

services of the surgeon in question; nor do they establish that appellant failed to exercise ordinary care in the selection of said physician.

The contention of the learned counsel for appellee are: 1. That the relation of principal and agent existed between appellant and Fertich, under the facts stated in the appellee's complaint; 2. That the act of Fertich in cutting off appellee's arm was within the scope of his authority as agent of appellant, under the facts alleged in the appellee's complaint; 3. That the act of Dr. Fertich in cutting off appellee's arm, as alleged in appellee's complaint, was a crime against the laws of Indiana, and amounted, in law, to an assault and battery, or mayhem; 4. That for such act by Fertich the appellant is liable in damages to appellee.

⁸⁸ The first and essential point to be determined is as to the sufficiency of the complaint to constitute a cause of action against appellant.

It is well settled, by numerous decisions of this court and others, that a corporation is responsible for the acts of an agent performed while engaged in the discharge of duties within the general scope of his agency, although the particular act was willful, and was not directly authorized.

A corporation that intrusts a general duty to an agent is responsible to an injured person for damages flowing from the agent's wrongful act, done in the course of his general authority, although, in doing the particular act, the agent may have failed in his duty to his principal, and disobeyed its instructions. The doctrine formerly enunciated, and adhered to by the courts, was, that the master could not be held liable for the willful wrongs of his servant, but that rule has been quite generally abrogated by the modern decisions: *Pennsylvania Co. v. Weddle*, 100 Ind. 138, and cases cited; *Oakland City v. Bingham*, 4 Ind. App. 545, and authorities there cited.

But a different question is raised under the facts set up in the complaint and the second paragraph of the answer in the case at bar, and the rule supported and adhered to by the decisions above cited is not decisive of the point involved in this cause. The complaint must be construed upon the theory which is most apparent and clearly outlined by the facts stated therein: *Jones v. Cullen*, 142 Ind. 335, and cases cited.

Considering the complaint with reference to all of its alleged facts, it is apparent that it proceeds upon the theory that Dr. Fertich was a physician employed or retained by appellant to render gratuitously medical or ⁸⁹ surgical services to its servants

or employes, and that the appellee, who had been accidentally injured while in the employ of appellant, was, with his own consent and by the aid of his fellow-servants, conducted to the office of Fertich, and that while there the doctor placed him under the influence of chloroform, from the effects of which he was rendered unconscious, and while in that condition, and in violation of the doctor's promise that he would not amputate his arm, he (Fertich) did "wrongfully, unlawfully, and unnecessarily cut off appellee's right arm."

Counsel for appellee, in his well-prepared brief, makes the claim that, under the facts alleged, this physician was the agent of appellant, and that the alleged tortious and unlawful act perpetrated by Fertich was within the scope of his authority as such agent, and is the gravamen of the action. There is an entire absence in the complaint of any facts to establish that Dr. Fertich was employed by the appellant to discharge any legal or contractual duties which it, as a corporation and common carrier, owed to appellee as its servant. Neither do the facts show expressly, or inferentially, that, in amputating appellee's arm, the surgeon was in the exercise or discharge of any duty which appellant, as a master, owed to appellee as its servant.

The appellant was engaged in the business of a common carrier, and the presumption must, at least, be that it was engaged in that business alone, and such other as was necessarily incident thereto or connected therewith.

The acts complained of are in no manner governed by the law which applies to the omission of the master to provide his employes with safe machinery and appliances. This is a duty enjoined by law, and one which he cannot delegate so as to exempt himself from liability ⁹⁰ by casting it upon an agent, officer, or servant employed by him.

As the question of appellant's liability presented by the facts does not come within the scope of, nor is it controlled by, the general principle just stated, hence, if there is any liability, it must result from the application of a rule more limited in its character, and one under which the principle of respondeat superior in a more narrow sense can be applied.

There was no general legal obligation resting upon appellant to provide surgical aid for its injured servants: *Terre Haute etc. R. R. Co. v. McMurray*, 98 Ind. 358; 49 Am. Rep. 752.

Appellant having assumed the duty to provide a physician and tender to its injured or sick employes his services, which they were free to reject or accept—a duty which was voluntarily,

assumed, and one which was not due from appellant to its employes, its liability cannot be extended beyond its negligence, if any, in the selection of the physician or surgeon. In other words, the appellant would be liable only, if at all, for its negligence in the employment, in the first instance, of an incompetent person, and not for his negligence or tortious acts in the treatment of its servants who had accepted his professional services. When this duty is voluntarily assumed by a corporation, such as appellant is shown to be, it is only bound to exercise reasonable care and diligence, and is not required to select a physician of the highest skill and longest experience in the practice of medicine. If it exercised this required care and diligence, its duty terminated, and it was not liable for the subsequent malpractice or wrongs of the physician committed in or about the treatment of its servant. This principle of law is firmly settled and sustained by a long line of decisions of the higher courts of other states, of well-recognized authority, and also by the adjudications ⁹¹ of our federal courts. This, we think, is the correct rule, and the one to which we yield our approval and adherence. It is not shown, in any way, that appellee was under any obligations to accept the services of Dr. Fertich; he was, so far as it appears, wholly free, and at liberty, from a legal standpoint, to reject the same, and call to his aid a physician of his own choice and selection, but this right he did not exercise, but, as it appears, willingly accepted the services of the physician in question. Hence, in accordance with the rule stated, if it is not shown that appellant was guilty of negligence in the employment of its surgeon, and that he was incompetent, appellee, under the law, will not be permitted to call upon appellant to respond in damages for the negligence or wrongs of which he complains. There are no allegations of facts in the complaint to show that the appellant violated this rule, which enjoined upon it the duty to exercise ordinary diligence in the selection or employment of the physician in controversy; therefore, it follows, when tested by the principle of law above mentioned, the complaint in the case at bar must be held insufficient to constitute a cause of action. The following cases fully support and sustain the conclusion we have reached: *Laubheim v. De Koninglyke etc. S. S. Co.*, 107 N. Y. 228; 1 Am. St. Rep. 815, and cases cited; *Eighmy v. Union Pac. Ry. Co.* (Iowa, 1895), 61 N. W. Rep. 1056; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Secord v. St. Paul etc. Ry. Co.*, 5 McCrary, 515; *Union Pac. Ry. Co. v. Artist*, 60 Fed. Rep. 365; *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624; 6 Am. St. Rep. 745;

O'Brien v. Cunard S. S. Co., 154 Mass. 272; Haas v. Missionary Soc., 26 N. Y. Supp. 868; Richardson v. Carbon Hill Coal Co., 6 Wash. 52; Van Tassell v. Manhattan etc. Hospital, 15 N. Y. Supp. 620, and ⁹² cases cited; and notes to Allen v. State S. S. Co., 132 N. Y. 91; 28 Am. St. Rep. 556; South Florida R. R. Co. v. Price, 32 Fla. 46.

We have examined the authorities cited by appellee, but, under the facts in this case, they do not sustain his contention. The case of Terre Haute etc. R. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752, where it is held that, under a certain emergency or necessity, a railroad company may be held liable for the services of a physician employed by its agent to attend one of its wounded servants, lends no support to the theory of appellee's action. It follows that the court erred in overruling the demurrer to the complaint; and, as the special verdict of the jury substantially finds and states the same facts as are alleged in the complaint, the law is with the appellant, and the court erred in not sustaining appellant's motion for judgment in its favor upon the special verdict. The judgment in favor of appellee is reversed, with costs, and the trial court is directed to sustain appellant's motion for judgment in its favor upon the finding of the jury.

THE CASE of Ohio etc. Ry. Co. v. Early, 141 Ind. 78, was an action to recover for alleged negligence causing the death of one Emmet Early, who, while in the employ of the above-named railroad company, fell under one of its cars, the wheels of which passed over his leg, so mashing and mangling it, that, had he lived, amputation would have been necessary. At the time of the accident, the railroad company summoned such medical aid as could be obtained; but the physicians summoned had no surgical instruments with which to make an amputation, and Early died from loss of blood before they could be obtained. The result of the case in the trial court was a verdict and judgment for the plaintiff for five thousand dollars, from which the railroad company appealed. The appellate court reversed this judgment on the ground that the evidence was insufficient to support the verdict. In deciding the case, the court said: "While a railroad company is under no general legal obligation to furnish an employé, who may receive injuries while engaged in the service of the company, their medical or surgical assistance, yet where a day laborer or employé has, by unforeseen accident to him, while engaged in the line of his duty as such employé, been rendered helpless, the dictates of humanity, duty, and fair dealing would seem to demand that it should furnish medical assistance. Of course, this duty could not rest upon the master in ordinary cases, in the absence of a contract to do so, but should rest upon him only in extraordinary cases, where immediate medical or surgical assistance is imperatively required to save life, or avoid further serious bodily injury. This duty on the railroad company only arises out of strict necessity and urgent exigency, where immediate attention thereto is demanded in order to save life or prevent great injury. The duty arises with the emergency, and with it expires: Terre Haute etc. R. R. Co. v. McMurray, 98 Ind. 358; 49 Am. Rep. 752, and authorities there cited. This duty does not clothe the master with the power to dictate to the

injured servant what particular physician or surgeon shall treat him, nor does it deprive such injured servant of the right of making a conscious and deliberate choice, while in the possession of his mental faculties, of the time, place, and person by whom, when, and where he will be treated. And if the master yielding to such right, complies with the request to be so treated, and at the same time places before him ample medical and surgical assistance, ready to be rendered to meet the emergency, which he declines, then such emergency has ceased and the duty with it. And if the choice thus made in the conscious exercise of his own free will turns out to be a mistake, the company is not liable, because the duty ceased with the expiration of the emergency."

RAILROADS—LIABILITY FOR NEGLIGENCE OF ITS PHYSICIAN OR SURGEON.—A railroad company, employing a physician or surgeon of ordinary competency and skill to care for employes injured in its service, is not liable for his carelessness, negligence, or malpractice in the performance of his professional duties toward an injured employe placed in his charge by the company: *Quinn v. Railroad*, 94 Tenn. 713; 45 Am. St. Rep. 767, and note.

CORPORATIONS—LIABILITY FOR ACTS OF AGENTS.—A corporation is liable for the acts of its agents while engaged in its business, in the same manner and to the same extent that individuals are liable under like circumstances: *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312. A corporation is liable for the torts of its agents within the apparent scope of their authority and in pursuit of the general purpose of the charter: *Jones v. Western Vermont R. R. Co.*, 27 Vt. 399; 65 Am. Dec. 206, and note; *Wheeler etc. Mfg. Co. v. Boyce*, 36 Kan. 350; 59 Am. Rep. 571; *Hopkins v. Atlantic etc. R. R.*, 36 N. H. 9; 72 Am. Dec. 287, and note; *Illinois Cent. R. R. Co. v. Read*, 37 Ill. 484; 87 Am. Dec. 260. A corporation is not liable for a tortious act committed willfully and maliciously by its servant, without authority from the directors or other governing body, even though it was done under orders from the president or general manager: *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479; 51 Am. Dec. 315, and note.

CHICAGO, ST. LOUIS, AND PITTSBURGH RAILROAD COMPANY v. WOLCOTT.

[141 INDIANA, 267.]

PLEADING—PROLIXITY OF DETAILS.—If a subject comprehends multiplicity of matter, and a great variety of facts, general pleading is allowed, in order to avoid prolixity.

PLEADING. — INDEFINITENESS OF COMPLAINT IS CURED by explicit findings as to general allegations, in a special verdict.

CARRIERS—FAILURE TO FURNISH TRANSPORTATION.—A carrier is liable for loss to a shipper, sustained by reason of its failure to furnish him with means of transportation, when he has no other means of placing his goods upon the market until after prices have fallen, and he has sustained a loss.

CARRIERS—FAILURE TO FURNISH TRANSPORTATION.—A carrier is liable for loss sustained by a shipper, by reason of its failure to furnish him with means of transportation for his produce to points beyond its own line, when he has no other means of shipment, and the carrier holds itself out as furnishing, and does furnish for others, transportation to such points.

CARRIERS—FAILURE AND INABILITY TO FURNISH TRANSPORTATION.—The inability of a common carrier to furnish

cars at the times and in the numbers required by a shipper, is matter of defense, which must be pleaded and proved in an action by the shipper to recover for failure to furnish such transportation.

CARRIERS—FAILURE TO FURNISH TRANSPORTATION—ASSIGNMENT OF CLAIM FOR DAMAGES.—A claim for damages against a railroad company, arising under a statute requiring it to furnish sufficient accommodations for the transportation of all property offered to it for transportation, may be assigned.

EVIDENCE — EXPERTS. — IF BOOKS, RECORDS, PAPERS AND ENTRIES ARE VOLUMINOUS, and of such character as to render it difficult for the jury to arrive at a correct conclusion as to amounts and balances, accountants may be allowed to examine such documents, and to testify to the result.

EVIDENCE—ADMISSIBILITY—WAIVER OF OBJECTION.—The right to object to the admission of evidence is waived by a subsequent admission that such evidence will not be controverted.

CARRIERS.—PAYMENT OF FREIGHT CHARGES required by the carrier before delivery, upon the alternative of nonshipment, is not a voluntary payment.

CARRIERS — FREIGHT CHARGES — RECOVERY. — Overcharges made, in violation of a statute prohibiting an increase in freight rates over the rate charged at the time freight is tendered to a railroad, may be recovered back when paid.

INTERSTATE COMMERCE—FREIGHT CHARGES.—A statute prohibiting an increase in freight rates over the rate charged at the time freight is tendered to a railroad company, is valid, and not in violation of the law of interstate commerce.

APPELLATE PRACTICE. — IRRELEVANT EVIDENCE, if admitted, is immaterial and not reversible error, if its admission is harmless, and the special verdict shows that the jury based its findings on other evidence.

CARRIERS—FAILURE TO FURNISH TRANSPORTATION.—TENDER OF PAYMENT OF FREIGHT CHARGES, when goods are offered for shipment and cars demanded, is not a condition precedent to recovery from a carrier for refusal to furnish cars and for increased freight demanded after such offer, if the carrier requires payment only before delivery to the consignee.

CARRIERS—FAILURE TO FURNISH TRANSPORTATION —EVIDENCE.—In an action by a shipper against a carrier, to recover for discrimination in failing to furnish him with cars when demanded, evidence as to the fluctuation of the markets, as well as statements made by the officers and agents of the carrier at the place of shipment relative to furnishing cars, is admissible in favor of the shipper.

COMMON CARRIERS MAY SO HOLD THEMSELVES out to the public as to become liable for not receiving and carrying goods beyond their own lines.

N. O. Ross, for the appellant.

W. H. H. Miller, F. Winter, J. B. Elam, J. C. Nelson, Q. O. Myers, M. Winfield, S. T. McConnell, A. G. Jenkins, and A. Wolcott, for the appellees.

²⁶⁹ **HOWARD, J.** This action was brought on the fifth day of June, 1889, in the Jasper Circuit court, against the appellant, to recover damages for alleged failures to transport grain, hay,

and straw from Wolcott, Seafield, and Remington, Indiana, to eastern markets, covering the entire time from September 1, 1883, to June 5, 1889.

The venue was, by agreement, changed from Jasper to Cass county, and on the fourth day of February, 1890, an amended complaint in five paragraphs was filed in the Cass circuit court. The paragraphs are substantially alike, except that each is based upon business done by appellee individually or in connection with other persons. None of such other persons, however, were parties to the judgment in favor of appellee, and none, therefore, are parties to this appeal.

The material allegations of the complaint are, that from the first day of September, 1883, the appellee was engaged in the business of buying, for shipment to eastern cities, hay, straw, oats, and other farm products ²⁷⁰ at the station of Wolcott, in White county, and at other points named; that for the purpose of facilitating such business, appellee purchased, built, and maintained hay, barns, presses, elevators, and storehouses, at great expense, to wit, fifty thousand dollars; that the appellant was, on said first day of September, 1883, and for a long time before, and has ever since been, a corporation engaged in the business of a common carrier and shipper of straw, hay, grain, and other kinds of farm products, from and between said stations of Wolcott, and others named, in the state of Indiana, to Chicago, Louisville, Boston, New York, and other cities named, in the eastern and central parts of the United States; that appellant scheduled its freight rates, without division into parts or interests, to all the cities and towns aforesaid, and also to all the Atlantic seaboard cities, and to all intervening towns and cities, intermediate between Wolcott and such cities, and has issued shipping bills, without change of cars, from Wolcott to all said cities and towns; that appellant, during all said time, held itself out as a through shipper of such farm products from Wolcott, and appellee's said other shipping points, to each and every one of the cities and towns aforesaid; that appellant advertised for freight business, and continuously operated the sole and only line of railroad over which said farm products could be transferred to market, during the whole time, from said first day of September, 1883, until the bringing of this suit, June 4, 1889; that during said time, appellant owned and operated a line of railroad from said shipping points directly to Chicago, Columbus, Pittsburg, and St. Louis, and, in fact, controlled such an interest in, and held such shipping contract with, what is called the Pennsylvania system and with other railways; that no reshipment or rebilling of freight was

required between said shipping stations and ²⁷¹ the cities and towns aforesaid; that during all said time, appellant was supplied with cars, engines, and other means and facilities amply sufficient to do all the business over its roads and connecting lines aforesaid; that appellee was induced to enter into said business of buying and shipping farm products at said stations on the assurance of appellant that it was a common carrier, and would, with promptness and diligence, transport such products to the markets aforesaid; that appellant held itself out to appellee as a common carrier for hire on a continuous line from appellee's places of business to the said markets, by a continuous line of transit; that relying on said conduct and assurances of appellant, appellee purchased large quantities of said products at Wolcott and other shipping points named during all said time, the particulars of which as to amounts, times of purchase, etc., are set out in detail; all of which, from time to time, as the same were purchased, was offered and tendered to appellant for shipment, with requests for suitable cars therefor, to the several markets aforesaid; that appellant failed, neglected, and refused to furnish cars as requested, so that appellee had on hand, and in store at his said places of business, large quantities of said products, all as set out in detail, at times named; that at the several times when said products were in store, and on hand for shipment as aforesaid, appellee demanded of appellant cars and means of transportation, and that appellant transport such products to the cities and towns aforesaid on its advertised line of shipment, demanding such cars as were controlled by the appellant company, which demand the appellant refused, and neglected to supply; that appellee was at all times ready, willing, and able to pay to appellant the usual customary rates for shipment charged by it to the markets aforesaid; but appellant failed and refused ²⁷² to transport said property, or any part thereof, within a reasonable time, and until after so long delay that appellee had to suspend business; that prices declined, cost of storage and other expenses increased, including use of warehouses, additional expense of handling such merchandise, interest on money invested, additional insurance and shrinkage of property, which caused appellee great and irreparable damages, all as set out in detail; that appellant raised and advanced the rate of freight after the goods were offered for shipments, in amounts and at times as stated. Other specific allegations of loss are made.

It is further alleged that while grain and hay were being offered for transportation, and while prices were high at the

points to which appellee desired to ship, the appellant had, or could have with reasonable care and diligence, cars sufficient to transmit to such markets all the products aforesaid; but that appellant failed and refused to supply such cars, but used the same exclusively to take freight at railroad crossings and competing places not contiguous to appellant's line of railroad, and neglected and refused appellee's freight, merely because appellee had no competitive line of railroad on which to ship his hay and grain. The several items of loss by such decline of prices are set out. The demand for damages for all losses to appellee for the six years is fifty thousand dollars. •

Motions were made by appellant, and overruled by the court, to require appellee to separate his complaint into paragraphs. Of this counsel for appellant says: "Appellant insists that each and every separate demand of cars, and the refusal to furnish, when it was its duty to do so, constituted a distinct and separate cause of action, and that more than one such cause of action cannot properly be stated in the same paragraph of complaint. 278 The several and independent causes of action, amounting to several hundred in number, and covering a period of near six years, are inserted in one paragraph of the complaint."

We are inclined to think that counsel's own statement is a sufficient refutation of the contention on this point. Such a complaint of several hundred paragraphs, as contemplated by counsel, would break down of its own weight.

In 1 Chitty's Pleading, 235, as cited by Perkins, J., in *State v. McCormack*, 2 Ind. 305, it is stated that: "In civil cases, 'it is a rule that where a subject comprehends multiplicity of matter, and a great variety of facts, there, in order to avoid prolixity, the law allows general pleading'": See, also, *Gaff v. Hutchinson*, 38 Ind. 341.

The court also overruled a motion to make the complaint more specific. At first, appellee depended upon exhibits to the complaint, and upon the recitals in such exhibits, as a sufficient substitute for specific allegations as to the times when, the places from and to which, and the articles and amounts for which, transportation was demanded; also, as to values of articles, times at which freight rates were advanced, the length of time articles were delayed in shipment, etc.

These exhibits were held by the court insufficient and improper for such purposes, and were stricken out on motion. Afterward, however, by leave of court, the complaint was so amended that the particulars, as we think, were sufficiently alleged.

The complaint is further attacked in arguing against the ruling of the court on demurrer. We think that the amendment to the complaint, above referred to, setting out the particulars as to times when demand was made ²⁷⁴ and amount and character of freight, supplied any defects that theretofore existed in the complaint. In addition, the observation already made is to be kept in mind, that in a case like this, which comprehends a multiplicity of matter, the law yields to the necessity of the situation, and, to avoid prolixity in the statement of details, general pleading is not only allowed, but is to be commended. The complaint is already as full of details as is desirable. Whatever is not stated is more properly matter of evidence than of pleadings. The general facts are sufficiently pleaded. The jury, in their special verdict, made their findings explicit as to these general allegations in all cases where there was any finding for appellee. The indefiniteness of the complaint, if any, was thus cured.

As to the contention that the complaint should state facts showing that the appellant could furnish cars at the several times and in the numbers required, that was matter for defense. If the company were, in fact, unable to furnish the required cars without undue interference with its business or with the rights of shippers at other points, that should be shown by the company. The company held itself out to the appellee, and to the public generally as a common carrier to the several markets named.

The complaint alleges that there was no competition against appellant at the shipping points of appellee, and that appellant discriminated against appellee by refusing him cars and at the same time furnishing cars to others doing business at competing points.

We think the allegations of the complaint were quite sufficient on this point, and if there were any reasons why appellant could not furnish cars when demanded, appellant should aver the same by way of answer. Appellant knew the conditions of its own business much ²⁷⁵ better than appellee could know it: See *Pittsburg etc. Ry. Co. v. Racer*, 5 Ind. App. 209; *Pittsburg etc. Ry. Co. v. Morton*, 61 Ind. 539; 28 Am. Rep. 682.

It is finally contended that the complaint is defective, for the reason that the cause of action arose in favor of appellee jointly with others, and that the interest therein held by those others could not be assigned to appellee, as was here attempted, inasmuch as actions in tort cannot be assigned.

It is true that the right of action for mere personal torts, such

as assault and battery, which die with the party and do not survive to his personal representatives, cannot be assigned.

The wrong charged as done by appellant in this case is the violation of sections 5185 and 5190 of the Revised Statutes of 1894 (Rev. Stats. 1881, secs. 3925, 3926), requiring railroad companies to furnish sufficient accommodations for the transportation of such passengers and property as shall, within a reasonable time previous thereto, offer or be offered for transportation. There is no fine or penalty attached, but the corporation is required to pay to the aggrieved party all damages sustained.

In Louisville etc. Ry. Co. v. Goodbar, 88 Ind. 213, it was held that a claim against a railroad company, under the statute providing for damages for the killing of stock, may be assigned. The measure of the damages in that case was the value of the animal killed; in this case, it is the loss to the business and property of appellee, occasioned by the failure of the company to transport the property when demanded. In both cases, the action is for damages to the owner of property for the wrong done thereto by a railway company in violation of the statute. If the right of action may be assigned in the one case, it may be in the other, and we are of opinion that the right of action in each case, being for damages ²⁷⁶ to property, and not to person, was assignable: See, also, Patterson v. Crawford, 12 Ind. 241; Pomeroy's Remedies and Remedial Rights, 2d ed., secs. 144, 147; 1 Am. & Eng. Ency. of Law, 833, and authorities cited in notes.

Many questions are discussed in relation to the motion for a new trial. It seems to admit of doubt whether the bill of exceptions, as set out in the transcript, is properly in the record. The transcript fails to show "the usual formula for the beginning of an ordinary bill of exceptions," followed by a recital as to the evidence, as suggested by Judge Mitchell in the case of Wagoner v. Wilson, 108 Ind. 210. Neither is there "the usual formal ending of an ordinary bill of exceptions." In a certificate signed by the judge, the paper in question is called "a bill of exceptions, . . . being the original longhand manuscript of all the evidence." But the longhand manuscript itself is not a bill of exceptions. Rather, as the statute says, it should "have been incorporated in a bill of exceptions," after having first been filed in the clerk's office. In the clerk's certificate, also, the document is styled "a bill of exceptions, . . . containing and being the original longhand manuscript": See Marshall v. State, 107 Ind. 173; Board v. Huffman, 134 Ind. 1.

In addition, it appears that the only certificate of the clerk

authenticating the transcript is without the seal of the court. Such seal has, in a recent case, been held necessary: *Conkey v. Conder*, 137 Ind. 441.

Appellee has, however, made no objection to these defects, but has discussed the evidence at length as if the record was duly authenticated. For this reason, therefore, and also for the reason that, by very liberal intendment, it may, perhaps, be said that the certificate of the trial judge has cured the defects referred to, we have ²⁷⁷ concluded to consider the questions raised under appellant's assignment of error, that the court erred in overruling the motion for a new trial.

It is first urged that the court erred in overruling the motion to suppress certain questions and answers in the deposition of Percy S. Taylor. It is claimed that the evidence thus elicited was irrelevant; that would not make the error, if it were one, sufficient to reverse the judgment: *Bischof v. Coffelt*, 6 Ind. 23.

But it does not seem that the question is in the record. The court ordered the motion to suppress, together with the rulings of the court thereon and the exceptions of appellant, to be made a part of the record. Whether such motion, rulings, and exceptions could thus be made a part of the record without a bill of exceptions we need not say; for while the motion to suppress, and reasons therefor, were set out in full, as ordered, yet the rulings of the court and the exceptions of appellant, if any there were, are wholly omitted from the record. It is true that, in the general bill of exceptions, when the deposition was offered to be read in evidence, appellant objected to its introduction; but the reasons there given, other than those relating to irrelevancy, rather tend to show that the ruling of the court, in submitting the evidence, was correct. These reasons show that the appellee was interested in the business, even before the assignment of any cause of action was made to him. We have already seen that the fact that the wrong charged against appellant was the violation of a statute which prescribed damages for such violation, did not prevent the assignment of a cause of action based on such violation.

It is objected that the court permitted the witness, William H. Clark, to testify as to the contents of the purchasing and receiving books of appellee, using, while giving his evidence, an abstract of those books made by ²⁷⁸ himself after his examination of the originals. It has been held that where books, records, papers, and entries are voluminous, and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts, balances, etc., accountants may be allowed to examine such books, etc., and testify as to the result: *Hollings-*

worth v. State, 111 Ind. 289; Culver v. Marks, 122 Ind. 554; 17 Am. St. Rep. 377; Equitable etc. Ins. Co. v. Stout, 135 Ind. 444.

Besides, we are of opinion that appellant, on the trial, waived the right to insist upon this objection. When the appellee was afterward on the witness stand and interrogated as to the same matters, counsel for appellant stated: "The defense will not attempt to controvert the amount received and shipped out as shown by Mr. Clark's statement." This would seem to have amounted to a withdrawal of all objections made to the character of the evidence given by the witness Clark.

It is next objected that the court permitted the witness Henry Wolcott to testify as to advances made in rates of freight by appellant after there had been a tender of freight for shipment and a demand for cars. It is urged that the payments of such advances made by appellee were voluntary, and cannot, therefore, be recovered back.

We think, in the first place, that it was clearly established that the freight paid was not a voluntary payment. In the printed bill of lading used by appellant was the following condition: "Owner or consignee shall pay at the rate below stated, freight charges before delivery, and according to weights as ascertained by either carrier."

Appellee had one alternative only according to which he might refuse to pay the freight exacted by appellant, that is, not to ship his farm products to market. If he did ship, however, either he or his consignee must pay ²⁷⁹ the freight before the goods would be delivered. There was nothing voluntary about such a payment.

Section 5333 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 4038), provides that: "The various railroad corporations doing business within the state of Indiana shall not, at any time, increase or advance their rates of freight, or charge for the transportation thereof from one point to another a sum greater than the rate of freight or charge for transportation asked or charged by said railroad corporations at the time such freight is offered or tendered to said railroad corporations for transportation."

If the overcharges made in violation of this section of the statute cannot be recovered back, the statute is itself a nullity: See Louisville etc. R. R. Co. v. Wilson, 132 Ind. 517, and authorities there collected.

Neither is it true that the foregoing statute is invalid, as being in conflict with the right of Congress to legislate upon interstate commerce. It is a regulation to protect shippers doing business in the state from unjust overcharges for transportation.

The admission of certain evidence as to the value, at given dates, of hay and other products, at the shipping points, while improper, was harmless.

The special verdict shows that the jury based their findings of damage by reason of the falling markets upon the price of the different products at the points of destination, which was correct. Appellant was not, therefore, harmed by such irrelevant testimony. Testimony as to the fluctuation of the markets was certainly admissible.

Because the amount of the freight was not paid or tendered when the goods were offered for shipment and cars demanded, it is argued that there could be no recovery. That depends on the custom of the carrier. In this case, as we have seen, appellant's own bill of lading ²⁸⁰ shows that the freight charges were not exacted in advance. The owner or the consignee was required only to pay the freight before the goods were delivered to the consignee. It is not contended that the goods were, or could be, taken from the carrier without payment of the freight due.

There was no error in admitting evidence of statements made to appellee by the officers and agents of appellant in relation to furnishing cars, and other like matters. As to such things, appellant could speak only by such agents. By its printed rules, and by the spoken words of its officers and agents alone, could appellant communicate with appellee.

Certain instructions were refused by the court, and this is complained of as error. As to some of the instructions so refused, there was, as we think, no error committed; as to all of them, no harm was done appellant, as the jury made no finding of damages on the matters to which the instructions related.

The verdict is fully supported by the evidence. Indeed, the jury rejected a large part, fully three-fourths of the claims of appellee, and only allowed that which was not only fully supported by the evidence but was also unquestionably authorized by law.

The appellant held itself out as a common carrier of such freight as appellee supplied, and to all the points to which appellee desired to ship his products, as alleged in the complaint. Of this there is no question.

In *Pittsburg etc. Ry. Co. v. Morton*, 61 Ind. 577, 28 Am. Rep. 682, the court says: "Doubtless a common carrier may so hold himself out to the public as to make himself liable for not receiving and carrying goods beyond his own line." This, without question, appellant did in this case. It is also clear, as we think, that appellant discriminated against appellee, who had no other

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means of ²⁸¹ shipment than by appellant's railroad, and refused to furnish him with cars at the same time that it supplied cars freely to other shippers at competing points.

We find nothing available for the reversal of the judgment, which is therefore affirmed.

CARRIERS—DUTY TO FURNISH TRANSPORTATION.—A carrier must receive all freight offered, and, within a reasonable time and in the order in which it is offered, transport it to the point designated by the owner or party in charge: *Ballentine v. North Missouri R. R. Co.*, 40 Mo. 491; 93 Am. Dec. 315, and note. Common carriers are liable for refusing to carry goods when properly requested, as well as for failure to carry after the goods have been delivered to them: *Doty v. Strong*, 1 Pinn. 313; *Burn*, 158; 40 Am. Dec. 773; *Beekman v. Saratoga etc. R. R. Co.*, 3 Paige, 45; 22 Am. Dec. 679. Railroad companies, as common carriers, must furnish such facilities for transportation as will meet the ordinary demands of the public: *Galena etc. R. R. Co. v. Rae*, 18 Ill. 488; 68 Am. Dec. 574, and note.

CARRIERS—DUTY TO CARRY BEYOND ITS OWN LINE.—The implied obligation of a common carrier, arising simply from his obligation to the public, is limited by the termini of his own route, and his mere connection with other routes, which he does not own, operate, or control, will not render him liable as such carrier for failure to carry, or provide means to carry, goods over such other routes: *Pittsburgh etc. Ry. Co. v. Morton*, 61 Ind. 539; 28 Am. Rep. 682.

INTERSTATE COMMERCE—REGULATION OF FREIGHT RATES.—A state can make no law regulating the rate of freight for the carriage of goods between that and another state, although the regulation be construed as applying to so much of the line as lies within its own borders: *Gulf etc. Ry. Co. v. Dwyer*, 75 Tex. 572; 16 Am. St. Rep. 926, and note. See, also, the extended note to *People v. Budd*, 15 Am. St. Rep. 490.

CARRIERS—LIABILITY FOR OVERCHARGE.—An action lies after payment to recover back an overcharge by a carrier: *Note to Cook v. Chicago etc. Ry. Co.*, 25 Am. St. Rep. 520.

WITNESSES—EXPERTS—ACCOUNT-BOOKS.—In an action on a check, the statement of an expert witness, who has examined the books of a bank, and made an abstract thereof, is admissible in evidence, when an opportunity to cross-examine is given: *Culver v. Marks*, 122 Ind. 554; 17 Am. St. Rep. 377.

NATIONAL STATE BANK v. VIGO COUNTY NATIONAL BANK.

[141 INDIANA, 352.]

CORPORATIONS—POWERS OF PRESIDENT.—The president of a corporation, by virtue of his office merely, has very little authority to act for the corporation. His powers depend upon the nature of the corporate business and the authority given him by the board of directors. They may invest him with authority to act as the chief executive officer of the corporation. This may be done by resolution, or by acquiescence in a course of transacting the corporate business.

CORPORATIONS—CONTRACT MADE BY PRESIDENT.—If a contract is made in the name of a corporation by its president, in

the usual course of business, which the directors have the power to authorize him to make, or to ratify after it is made, the presumption is that the contract is binding on the corporation.

CORPORATIONS.—ONE DEALING WITH THE PRESIDENT of a corporation, in the usual course of business, and within the powers which he has been accustomed to exercise without objection from the directors, has the right to assume that he has been invested with those powers.

CORPORATIONS—RECEIVERS OF RIGHT TO SUE.—After a receiver has been appointed for, and has taken possession to, the corporate property, he represents the creditors, and is the proper person to maintain an action to set aside chattel mortgages on the corporate property, as the rights of the creditors in that respect become vested in him.

FRAUD IS A QUESTION OF FACT, and, when essential to a cause of action, must be found as a fact, and not left to be inferred as matter of law.

FRAUDULENT CONVEYANCES.—To avoid a conveyance as fraudulent, the complaint must expressly charge that the instrument was executed with a fraudulent intent.

B. E. Rhoads and E. F. Williams, for the appellant.

J. Jump, J. E. Lamb, J. C. Davis, S. B. Davis, J. C. Robinson, S. M. Reynolds, and G. M. Davis, for the appellees.

253 MONKS, J. This action was brought by appellant against appellees to set aside two mortgages held by the Vigo County National Bank, purporting to have been executed by the Sanford Fork and Tool Company, and to recover judgment on certain notes held by appellant on said tool company.

The amended complaint is in four paragraphs, and the facts alleged in the different paragraphs are substantially the same.

After the averments concerning the indebtedness of the tool company to appellant, the only allegations necessary for the determination of the sufficiency of the complaint (the only question presented) are, in substance, that said tool company is otherwise indebted in the sum of two hundred and fifty thousand dollars, and is wholly insolvent, and was wholly insolvent on the seventeenth day of March, 1890; that on the twenty-fifth day of April, 1890, William Kidder, the president of said corporation, executed, in the name of the Sanford Fork and Tool Company, two chattel mortgages to secure twenty-eight thousand dollars each, to himself, as trustee for the Vigo County National Bank, one of the appellees, on all the personal effects of said company, which mortgages were filed for record the first day of May, 1890; **354** that said consideration for said mortgages was a pre-existing debt owing by said tool company to said bank, the said debt having been created a year before the execution of said mortgages; that said mortgages, and each of them, were executed by the said Kid-

der on his own motion, and without any authority or permission to him in that behalf previously given by said tool company, or its directors or stockholders; that said mortgages were executed without authority from said tool company or its directors or stockholders, and without the consent or knowledge of said tool company, its directors or stockholders, and that the execution of the same has never been approved, affirmed, or ratified by said tool company, the directors, or stockholders; that at the time of the execution of said mortgage, said tool company was wholly insolvent, which fact was well known to said Kidder, her indebtedness being three hundred thousand dollars, and her assets one hundred thousand dollars, the unsecured indebtedness aggregating one hundred and fifty thousand dollars, of which appellant held twenty-two thousand dollars; that within ten days after the execution of said mortgages, this action was brought; that said Sanford Fork and Tool Company did not execute said mortgages, or either of them, and did not ratify the execution thereof. Demand for judgment on the claims sued upon and that said mortgages be set aside.

The Vigo County National Bank demurred separately to each paragraph of complaint, which was sustained and exceptions reserved. The only error assigned is, that the court erred in sustaining said demurrer to each paragraph of complaint.

The statute under which the tool company was organized provides that the business of the corporation shall be managed by a board of directors, a majority of whom shall constitute a quorum: Rev. Stats. 1881, sec. 3854; Rev. Stats. 1894, sec. 5054.

⁸⁵⁵ Under this statute, the directors have full authority to act for the corporation, and represent it in all the matters relating to the corporate business: Brooklyn Gravel Road Co. v. Slaughter, 33 Ind. 185; Board v. Lafayette etc. R. R. Co., 50 Ind. 85.

The president of a corporation, by virtue of his office merely, has very little authority to act for the corporation; his powers depend upon the nature of the company's business and the authority given him by the board of directors. The board of directors may invest him with authority to act as the chief executive officer of the company; this may be done by resolution or by acquiescence in the course of dealing and manner of transacting the business of the corporation: Taylor on Corporations, secs. 202, 236, 238, and notes; Martin v. Webb, 110 U. S. 7; Northern etc. Ry. Co. v. Bastian, 15 Md. 494; Dougherty v. Hunter, 54 Pa. St. 380; Stokes v. New Jersey Pottery Co., 46 N. J. L. 240; Louisville etc. Ry. Co. v. McVay, 98 Ind. 391; 49 Am. Rep. 770; 17

Am. & Eng. Ency. of Law, 135-137, and notes; Jones on Chattel Mortgages, sec. 51.

When a contract is made in the name of a corporation by the president, in the usual course of business, which the directors have the power to authorize him to make, or to ratify after it is made, the presumption is, that the contract is binding on the corporation until it is shown that the same was not authorized or ratified: *Patterson v. Robinson*, 116 N. Y. 193; *Eureka Iron etc. Works v. Bresnahan*, 60 Mich. 332; 1 Morawetz on Corporations, sec. 538; 1 Beach on Corporations, sec. 203; 17 Am. & Eng. Ency. of Law, 124.

One dealing with the president of a corporation, in the usual course of business, and within the powers which the president has been accustomed to exercise without objection from the directors, has the right to assume that ³⁵⁶ the president has been invested with those powers: 1 Morawetz on Corporations, sec. 538; 1 Beach on Corporations, sec. 203; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Eureka Iron etc. Works v. Bresnahan*, 60 Mich. 332.

Each paragraph of the complaint, however, alleges that said mortgages were executed without any authority whatever, and were never ratified after they were executed, and we are of the opinion that the second, third, and fourth paragraphs were sufficient to withstand the demurrer.

There was no error in sustaining the demurrer to the first paragraph of the complaint, for the reason that it is therein alleged that, before the filing of the amended complaint, a receiver had been appointed in this action, and had taken possession of the property of the tool company. If a receiver had been appointed for, and taken possession of, the property of the corporation, as alleged, he represented the creditors, and was the proper person to maintain actions such as this, as the rights of the creditors in that respect become vested in him: *High on Receivers*, secs. 314, 315, 320; *Beach on Receivers*, secs. 439-442; *Taylor on Corporations*, secs. 542, 814; 20 Am. & Eng. Ency. of Law, 286-288, and notes; *Curtis v. Leavitt*, 15 N. Y. 9; *Attorney General v. Guardian etc. Ins. Co.*, 77 N. Y. 272; *Porter v. Williams*, 9 N. Y. 142; 59 Am. Dec. 519; 524, and notes; *Vail v. Hamilton*, 85 N. Y. 453; *Gray v. Davis*, 1 Wood, 420; *Davis v. Gray*, 16 Wall. 216; *Hutchinson v. First Nat. Bank*, 133 Ind. 280; 36 Am. St. Rep. 537, and cases cited; *Voorhees v. Carpenter*, 127 Ind. 300, and cases cited.

Other allegations in the complaint are discussed by counsel, but as the complaint is sufficient without them, the same will

not be considered, except to repeat what has often been held by this court: that in this state, by ³⁵⁷ statute, the question of fraud is made one of fact, and that when fraud is essential to the cause of action, it must be found as a fact, and not left to be inferred as a matter of law. In order to avoid a conveyance as being fraudulently executed, the complaint in such action must expressly charge that the instrument was executed with a fraudulent intent: *Hutchinson v. First Nat. Bank*, 133 Ind. 280; 36 Am. St. Rep. 537, and cases cited.

Judgment reversed, with instructions to overrule the demurrer of the Vigo County National Bank to the second, third, and fourth paragraphs of amended complaint.

CORPORATIONS—PRESIDENT—POWERS OF, GENERALLY.—

The president of a business corporation may, without any special authority from the board of directors, perform all acts of an ordinary nature which, by usage or necessity, are incidental to his office, and may bind the corporation by contracts in matters arising in the usual course of business: *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531; 24 Am. St. Rep. 351; *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621, and note; *Chicago etc. R. R. Co. v. Coleman*, 18 Ill. 297; 68 Am. Dec. 544; *Creeder v. Loud*, 86 Mich. 541; 24 Am. St. Rep. 134, and note; but the president of a corporation has no authority as such to act as its agent: *Wait v. Nashua Armory Assn.*, 66 N. H. 581; 49 Am. St. Rep. 630, and note.

RECEIVERS.—RIGHT TO SUE: See the extended note to *Chautauque County Bank v. White*, 57 Am. Dec. 451, and also the case of *Mandeville v. Avery*, 124 N. Y. 376; 21 Am. St. Rep. 678.

FRAUD AS A QUESTION OF FACT.—If, by statute, the question of fraud is made one of fact, and fraud is essential to the cause of action, it must be found as a fact, and must not be left to be inferred as a matter of law: *Hutchinson v. First Nat. Bank*, 133 Ind. 271; 36 Am. St. Rep. 537. See, also, *State v. Mason*, 112 Mo. 374; 34 Am. St. Rep. 890.

FRAUDULENT CONVEYANCES.—Fraudulent intent must be alleged: *Hutchinson v. First Nat. Bank*, 133 Ind. 271; 36 Am. St. Rep. 537.

THORNBURG v. AMERICAN STRAWBOARD COMPANY.

[141 INDIANA, 443.]

PARENT AND CHILD—DEATH OF BASTARD—RIGHT TO RECOVER.—A man who marries the mother of a bastard child, and receives it into his home as a member of his family, cannot recover for its death caused by the wrongful act of another.

PARENT AND CHILD.—STATUTES GIVING TO PARENTS the right to sue for the wrongful death of a minor child are in derogation of the common law, and must be strictly construed.

PARENT AND CHILD.—A man who marries the mother of a bastard child does not become its stepfather.

PARENT AND CHILD—DEATH OF BASTARD—RIGHT TO RECOVER.—A statute giving the right to parents to recover for the wrongful death of a minor child does not include a man who marries the mother of a bastard child.

J. F. Elliott and W. C. Overton, for the appellant.

J. C. Blacklidge, C. C. Shirley, and B. C. Moon, for the appellee.

⁴⁴³ MONKS, J. Appellant brought this action against appellee, under section 266 of the Revised Statutes of 1881 (Rev. Stats. 1894, sec. 267), to recover for the death of Charles O. Tonly, a minor.

This section provides that "A father (or, in case of ⁴⁴⁴ his death or desertion of his family or imprisonment, the mother) may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward."

To this complaint appellee filed a demurrer for want of facts, which was sustained and judgment rendered against appellant. The only error assigned is, that the court erred in sustaining the demurrer to the complaint.

Under this assignment of error, the only question for consideration is, whether or not a man who marries the mother of a bastard child, and receives the child into his home as a member of the family, can recover for the death of the child, when caused by the wrongful act of another.

It is firmly settled that under the foregoing section of the statutes a parent may maintain an action for injuries resulting in the death of his minor child: *Jackson v. Pittsburgh etc. Ry. Co.*, 140 Ind. 241; 49 Am. St. Rep. 192, and cases cited; *Louisville etc. Ry. Co. v. Goodykoontz*, 119 Ind. 111; 12 Am. St. Rep. 371, and cases cited.

It is also settled that section 266 of the Revised Statutes of 1881 (Rev. Stats. 1894, sec. 267), and section 284 of the Revised Statutes of 1881 (Rev. Stats. 1894, sec. 285), are to be construed together, the first-named section being applicable to cases of minors, and the latter to those of adults and minors whose father and mother have relinquished their right, respectively, to the services of the child by emancipation or otherwise: *Berry v. Louisville etc. R. R. Co.*, 128 Ind. 484, and cases cited.

Such right to maintain an action for damages on account of the death of a human being is entirely statutory, and, before appellant can recover such damages, he must bring himself clearly within the terms of the statute: *Jackson v. Pittsburgh etc. Ry. Co.*, 140 Ind. 241; 49 Am. St. Rep. 192, and cases cited; *Berry v. Louisville etc. Ry. Co.*, 128 Ind. 484, and ⁴⁴⁵ cases cited; *Louisville etc. Ry. Co. v. Goodykoontz*, 119 Ind. 111; 12 Am. St. Rep. 371, and cases cited; *Tiffany on Death by Wrongful Act*, sec. 116, and cases cited.

It is an old and firmly established rule that a statute in derogation of common law must be strictly construed. As this court said in Indianapolis etc. R. R. Co. v. Keely, 23 Ind. 133, speaking of this class of actions: "As the right to sue is purely a statutory one, and in derogation of common law, the statute must be strictly construed, and the case brought clearly within its provisions, to enable the plaintiff to recover": Stewart v. Terre Haute etc. R. R. Co., 103 Ind. 44.

Such a right of action exists only for the benefit of the person or persons specified in the statute, and, when the statute specifies who may bring such actions, only those named can maintain it. If no such persons exist, then no recovery can be had: Berry v. Louisville etc. Ry. Co., 128 Ind. 484; Metcalfe v. Steamship Alaska, 130 U. S. 201; Western Union Tel. Co. v. McGill, 6 Co. Ct. App. 521; 12 U. S. App. 651; 57 Fed. Rep. 699, and cases cited; St. Louis etc. Ry. Co. v. Needham, 3 Co. Ct. App. 129; 10 U. S. App. 339; 52 Fed. Rep. 371.

Section 266 of the Revised Statutes of 1881 (Rev. Stats. 1894, sec. 267) does not, in terms, give a right of action to a stepfather. As generally understood, the husband of one's mother by a subsequent marriage is a stepfather; strictly speaking, therefore, a man who marries the mother of a bastard child does not become the stepfather of such child: Bouvier's Law Dictionary, tit. Stepfather.

Applying the principles stated to this case, it is clear that appellant cannot maintain this action. If it were conceded that he was the stepfather of the child named in the complaint, he would not come within the terms of the statute. Indeed, the definition given by Wharton, of the word "stepfather" would be decisive of the question: ⁴⁴⁶ "Stepfather—The husband of one's mother who is not one's father": Wharton's Law Dictionary.

The word "father," therefore, does not mean stepfather, nor does the word "child" mean stepchild, even when the same is used in wills, where the rules of construction are not so strict as those governing the section of the statute in controversy: 11 Am. & Eng. Ency. of Law, 870; 3 Am. & Eng. Ency. of Law, 230; 8 Am. & Eng. Ency. of Law, 1412, note 2; Shearman v. Angel, 1 Bail. Eq. 357; 23 Am. Dec. 166; Porter v. Porter, 7 How. (Miss.) 106; 40 Am. Dec. 55.

It is not necessary to decide who, if anyone, was the proper party to bring this action, whether the mother or an administrator; that question is not before us. What we adjudge is that

appellant, whether properly called a stepfather or not, cannot maintain this action.

There is no error in the record.

Judgment affirmed.

NEGLIGENCE CAUSING DEATH—CONSTRUCTION OF STATUTE.—The right of action for negligently causing the death of a person is purely statutory, and the action can only be maintained in the name of the person in whom the right of action is vested by the statutes of the state where the injuries resulting in death are inflicted: *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 206; 12 Am. St. Rep. 863, and note.

NEGLIGENCE CAUSING DEATH—SUIT BY STEPFATHER.—A stepfather may represent his wife's children as next friend, in an action for damages for the death of their father: Note to *Usher v. West Jersey R. R. Co.*, 12 Am. St. Rep. 870.

CURRAN v. ABBOTT.

[141 INDIANA, 492.]

PRACTICE—VOID ORDERS.—AN EX PARTE order of court, procured by the clerk thereof, forbidding a guardian from issuing execution on a judgment procured by him as guardian, is void.

GUARDIAN AND WARD—RIGHT OF GUARDIAN TO REIMBURSEMENT.—A guardian has an equitable right to be reimbursed for all reasonable expenses properly incurred in the execution of his trust, and they are a lien on the estate which he is not compelled to part with until his disbursements are paid.

GUARDIAN AND WARD—LIEN FOR REIMBURSEMENT.—A guardian has an equitable lien for reimbursement for expenses paid by him in procuring a judgment in favor of his ward's estate. This lien extends to the judgment, and all persons dealing with reference to such judgment must take notice of the lien.

GUARDIAN AND WARD—ENFORCEMENT OF LIEN FOR REIMBURSEMENT.—An equitable lien of a guardian for reimbursement for expenses paid in procuring a judgment in favor of his ward's estate may be enforced against such estate, although the ward has assigned his interest therein after reaching majority, and regardless of the question of fraud between the ward and his assignee.

GUARDIAN AND WARD—ENFORCEMENT OF EQUITABLE LIEN FOR REIMBURSEMENT.—A guardian may enforce his equitable lien against his ward's estate for expenses paid in procuring a judgment in favor thereof, whether the guardian is personally liable for such expenses, or liable therefor only in his fiduciary capacity.

GUARDIAN AND WARD—LIEN FOR REIMBURSEMENT.—If a guardian has an equitable lien for reimbursement from his ward's estate for expenses incurred in procuring a judgment in favor thereof, and has other funds in his hands besides such judgment, he may be compelled to exhaust such funds before resorting to the judgment for reimbursement.

GUARDIAN AND WARD—LIEN FOR REIMBURSEMENT—ACCOUNTING.—A guardian can enforce against his ward's estate an equitable lien for reimbursement for expenses incurred by him in behalf of such estate, without an accounting and settlement of his guardianship, although the ward has become of full age.

C. A. Korbly and W. O. Ford, for the appellant.

C. E. Walker, A. D. Vanosdol, and H. Francisco, for the appellees.

⁴⁹³ MONKS, J. Appellant brought this action against appellees. The complaint is in substance as follows:

That in 1891 Carrie Curran, appellant's daughter, was a minor and unmarried; that appellees were the owners and proprietors of a newspaper in Madison, Indiana, and published in said newspaper a libel of and concerning said Carrie Curran, for which she brought an action against the appellees in the Jefferson circuit court, and asked to be allowed to prosecute the action as a poor person, which leave was refused by the court; that appellant and his daughter resided in Ripley county, Indiana, and he was thereupon appointed guardian of his daughter by the Ripley circuit court, and, on motion, was allowed, by the Jefferson circuit court, to be substituted in her said action as plaintiff, and as such filed an amended complaint, on which there was issue joined, a trial had, and judgment rendered, on June 22, 1891, in favor of appellant, guardian of Carrie Curran, for fifteen hundred dollars and costs against appellees; that she arrived at the age of twenty-one years on the eleventh day of March, 1892, and afterward, in 1892, married one Clel Cain, an adult, who was then a resident of the state of Kentucky, where he and the said Carrie removed and have ever since resided; that appellant prosecuted said action for libel in his own name, as such guardian, to final judgment as aforesaid, and employed Nicholas Cornet, an attorney at law, to prosecute the same, and paid him a retainer fee of ten ⁴⁹⁴ dollars, and agreed to pay him a further amount equal to fifty per cent of the judgment that might be recovered by him in said suit, out of the sum so recovered, out of which sum said Cornet agreed to pay all the attorneys' fees for such associate counsel as he might select to assist him in said suit; that appellant became liable to pay said Cornet for his services and the services of his associate counsel, out of the proceeds of said judgment, the sum of seven hundred and fifty dollars, with six per cent interest from the rendition of said judgment; that said amount was a reasonable compensation for the services which he and his associate counsel rendered; that said services were necessary to the prosecution of said suit, and all of the other expenses incurred by appellant were reasonably necessary in the prosecution of said suit and in the proper discharge of his duties as such guardian, and such charges are reasonable; that besides the ten dollars paid said Cor-

net, appellant has paid out and expended, of his own money, in the prosecution of said suit, twenty-five dollars; that he spent eight days away from home to attend to matters in connection with said action, and four days in taking out letters of guardianship and attending to matters connected therewith, and his time was reasonably worth two dollars per day; that he incurred costs in the Ripley circuit court amounting to two dollars and fifteen cents, and a further sum of one dollar clerk's fees, and five dollars will be required to pay an attorney to make a final account, making eight dollars and fifteen cents that will be required to close up and settle said trust.

Said ward, after she became of age, did not have an accounting with appellant, neither did her husband, either alone or with his wife, have such accounting, and they have at all times since their intermarriage been out of the jurisdiction of the state of Indiana. Said appellees, while said cause was pending in this court on ⁴⁹⁵ appeal, well knowing that appellant, as guardian, had no assets or means whatever in his hands with which to pay his attorneys' fees, costs, and expenses aforesaid, and desiring to cheat and defraud him and them out of said fees and costs, sent one Chapman, one of appellees, to Kentucky to see said Carrie and her husband, for the purpose of inducing them to assist in accomplishing their desires, and said appellee, for the purpose of working on the fears of said Carrie and her husband, represented that said cause would be reversed, because it was recovered by this appellant, and not in the name of said Carrie, by her next friend. Said appellee knew that, by the law of the state of Kentucky, whatever money he paid said Carrie would at once vest in her husband, and intending to cheat and defraud appellant, and without his knowledge or consent, or the knowledge or consent of his attorney, offered to pay said Carrie five hundred and fifty dollars if she and her husband would enter full satisfaction of record of said judgment recovered by appellant as aforesaid, and said Carrie and her husband, well knowing the object and intent of appellees to cheat and defraud appellant and his attorneys, accepted said offer, and thereupon appellees, by said Chapman, paid her five hundred and fifty dollars, and she and her husband, on December 8, 1892, executed and delivered to said appellees a satisfaction piece and release of said judgment and all claims and causes of action to date thereof. Said appellees caused said satisfaction piece and release to be attached to the margin of the order-book on the page on which said judgment was entered. Appellees afterward procured the clerk of

the court to procure an ex parte order from the court forbidding the clerk to issue an execution on said judgment against said appellees in favor of appellant, and the same was procured and entered of record, without any notice or service of process on appellant, and the same is coram ⁴⁹⁶ non judice and void. Appellant has no means or property belonging to said Carrie, his late ward, out of which he can pay said fees, costs, and expenses; that at the time of his appointment as such guardian, his said ward had no estate or property, except the said claim against appellees; that no assets or property of said ward have ever come into his hands as such guardian, and said ward has no estate or property whatever in this state, or elsewhere, except as stated; that he is entitled to have said fees, costs, and expenses paid out of said judgment, which was recovered by him in his own name as guardian; that appellant has been unable to have any accounting with his late ward or said husband, by reason of their being out of the jurisdiction of the Ripley circuit court; that he has filed in the Ripley circuit court his duly verified account of final settlement with his said ward, in which he has set forth, substantially, the foregoing facts, and demanded that he be allowed all said expenditures and liabilities out of said judgment; that said fees, liabilities, and payments are due and unpaid. Prayer that said pretended release and satisfaction be set aside and declared void as against the appellant, and he be adjudged to have a personal interest in said judgment against appellees to the full amount of said outlay, attorneys' fees, court costs, and guardian's services, and that appellant have execution on said judgment for said sum due him, to wit, nine hundred and twenty-five dollars and fifteen cents, and the court cost recovered in said action, and for all other relief.

A demurrer for want of facts was sustained to the complaint, and appellant refusing to plead further, judgment was rendered against him. The only error urged is the action of the court in sustaining the demurrer to the complaint.

It is contended that the allegation in the complaint concerning the clerk's procuring an order of the court ⁴⁹⁷ forbidding him to issue an execution on the judgment, shows former adjudication of the right to set aside said satisfaction and have execution on said judgment. An ex parte order of the court, procured by the clerk, forbidding him from issuing an execution on the judgment, without notice or service of process on appellant, was void as to him. The allegations in the complaint do not show former adjudication, but exclude the idea that appellant or

his attorneys appeared to the proceeding. Had they appeared, the order would not have been *ex parte*: *Bigelow on Estoppel*, 27; *Kramer v. Matthews*, 68 Ind. 172.

Appellees earnestly insist that a guardian has no lien on the ward's estate to reimburse him for reasonable costs and expenses paid or incurred in managing the ward's estate. That when she became of age, appellees had the right to settle said cause with her, and that, having done so while the same was pending in this court on appeal, and she having executed a release of said judgment, appellant must look to her for reimbursement for his expenses, costs, and attorneys' fees which he has paid or is liable for.

It is well-settled law that a trustee has an equitable right to be reimbursed for all reasonable expenses properly incurred in the execution of his trust, and that the expenses of a trustee in the execution of his trust are a lien upon the estate, and he will not be compelled to part with the property until the disbursements are paid: 2 *Perry on Trusts*, secs. 485, 907, 910; 2 *Pomeroy's Equity Jurisprudence*, sec. 1085; 2 *Jones on Liens*, secs. 1175, 1177; *Overton on Liens*, secs. 587, 589.

A guardian, in a general sense, is a trustee: 1 *Perry on Trusts*, sec. 1; 1 *Pomeroy's Equity Jurisprudence*, sec. 157; 2 *Pomeroy's Equity Jurisprudence*, secs. 1088, 1097; *Field on Infants*, sec. 132; *Overton on Liens*, sec. 584.

⁴⁹⁸ Appellant, in the prosecution of the original action, paid expenses and costs and incurred liability for attorneys' fees, and is clearly entitled to reimbursement for the same, so far as they are reasonable and proper, out of the judgment recovered: *Field on Infants*, sec. 153; 2 *Jones on Liens*, sec. 1176.

He has an equitable lien on the same for his reimbursement, of which appellees and Carrie Curran were required to take notice. This is not an action to enforce the lien of an attorney for fees, but to reimburse a guardian for his expenses and liabilities, incurred in the prosecution of the case, out of the judgment recovered; in other words, out of the fund. Even a next friend may enforce an equitable lien under like circumstances: 2 *Jones on Liens*, sec. 1176; *Daniel v. Powell*, 29 Ga. 730.

It is not material whether appellant or his ward held the legal title to the judgment; appellees were bound to know that appellant held a lien on the fund recovered, which he could enforce for his protection. When they settled with the ward, it was subject to the right of appellant to be reimbursed out of the judgment. Nor do we think the allegations in regard to fraud im-

portant. Appellant's right to reimbursement results from the plainest principles of equity. As guardian, he recovered the judgment incurred and paid costs and other expenses, and, there being no other estate out of which he can be paid, he may resort to the judgment, even though appellees did not intend, by their settlement with his daughter, to cheat and defraud him. Appellant's right to be reimbursed and to enforce an equitable lien is the same, whether he is personally liable for attorney's fees, or is only liable in his fiduciary capacity.

It is true that if he had other funds of his ward in his hands sufficient to reimburse him, appellees could compel ⁴⁰⁰ him to first exhaust such funds: 1 Story's Equity Jurisprudence, sec. 633, and notes.

The reasoning in *Yelton v. Evansville etc. R. R. Co.*, 134 Ind. 414, clearly sustains the proposition that the judgment recovered in this case is chargeable with the expense of collection, including costs of guardianship and attorneys' fees.

Appellees contend "that appellant cannot maintain an action against his ward, after she becomes of age, until his guardianship accounts have been fully settled in the court appointing him, and the balance found due to and awarded him by said court: *McLane v. Curran*, 133 Mass. 531; 43 Am. Rep. 535. For the appellant to maintain this action at all there must: 1. Be a debt due him from the ward; and 2. The debt must be a lien on the alleged judgment, not only as against the ward, but also as against appellees."

In a number of states, including Massachusetts, when the ward becomes of age, no action can be maintained by either against the other, until an accounting is had, and the balance, either way, determined and ordered paid over by the court in which the appointment of guardian was made. If there is a balance due the ward, he may then sue the guardian on his bond, or, if the balance is due the guardian, he may maintain an action therefor against his former ward: *Tyler on Infancy*, 268, 269.

But such is not the law in this state. It is provided by statute that when the ward arrives at the age of twenty-one years, the guardian shall fully account, and pay over, to the proper person all the estate of the ward remaining in his hands: Rev. Stats. 1881, sec. 2521; Rev. Stats. 1894, sec. 2685.

It has been uniformly held by this court that when the ward becomes of age, he has the right to sue upon the ⁵⁰⁰ bond of the guardian, without any accounting and without demand:

Davis v. State, 68 Ind. 104; **Stumph v. Guardianship of Pfeiffer**, 58 Ind. 472; **Stroup v. State**, 70 Ind. 495; **Jones v. Jones**, 91 Ind. 378.

In such action on the bond, an accounting may be had and judgment rendered on the bond for the amount found due, if anything.

Under these authorities, it is clear that appellant was not required to first have an accounting in the Ripley circuit court before he could maintain this action. It follows, therefore, that the court erred in sustaining the demurrer to the complaint.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

GUARDIAN AND WARD—REIMBURSEMENT OF GUARDIAN. A guardian is entitled to reimbursement for expenditures incurred in prosecuting a claim for his ward: **McDowell v. Caldwell**, 2 McCord Eq. 43; 16 Am. Dec. 635; **Ramsay v. Joyce**, 1 McMull. Eq. 236; 37 Am. Dec. 550.

DANTZER v. INDIANAPOLIS UNION RAILWAY COMPANY.

[141 INDIANA, 604.]

HIGHWAYS.—AN OBSTRUCTION of the easement of access need not always be upon the immediate front of the lot whose owner is affected. If the obstruction, though remote, renders access to the lot impossible, or impairs it in a substantial manner at the point where it abuts upon the street, the property right of the owner is invaded, and he may recover; but his recovery is limited to injury different in kind, and not simply in degree, from that suffered by the community in general.

HIGHWAYS—DAMAGES FOR OBSTRUCTION OF ACCESS. Mere inconvenience or disadvantage, so long as an obstruction in a street or highway complained of does not, in some substantial degree, impair or deprive the lotowner of the usual and ordinary means of access to his property, does not give a right of action.

HIGHWAYS—DAMAGES FOR OBSTRUCTION OF ACCESS. Inconvenience of access, arising from obstructions in the side of the street remote from the property obstructed, is *damnum absque injuria*.

HIGHWAYS.—EASEMENTS OF ACCESS OF LIGHT AND OF AIR are all confined to the street in front of the lot. When a remote obstruction does not affect these, there is no injury in a legal sense, and though access to property is rendered more inconvenient or more circuitous by such obstruction, yet no right of action arises therefrom.

HIGHWAYS — OBSTRUCTION TO ACCESS — DAMAGES.— Whether one whose access to his property has not been cut off by the vacation of part of a street has suffered legal injury therefrom for which he may recover is a question of law. The degree of injury suffered is a question of fact.

S. C. Claypool, W. A. Ketcham, J. S. Duncan, C. W. Smith, A. Seidensticker, and J. W. Claypool, for the appellants.

F. Winter, A. Baker, and E. Daniels, for the appellee.

604 HACKNEY, J. Formerly the appellee's station for the reception and discharge of passengers for all of the railways 605 entering the city of Indianapolis was bounded on the north by Louisiana street, on the east by Meridian street, on the south by McNabb street, and on the west by Illinois street. McNabb street extended but to the intersections of Meridian and Illinois streets. One square south of McNabb street, and parallel with that street, was and is South street, extending east and west, and connecting with numerous streets of said city running north and south. Between McNabb and South streets, about midway, and on the west side of Illinois street, were, and ever since have been, the lots of appellants, upon which was erected and maintained a public hotel. At that time, Illinois street extended for miles north and south from appellants' property, which abutted upon it, and was free to public travel upon its surface, excepting as the appellee's railway tracks crossed the same. Beneath the surface of said Illinois street, and under said railway tracks, had been constructed and used a tunnel for public travel between Georgia street (the second street north of said station) and said South street.

These conditions existing in June, 1886, the common council of said city vacated that part of Illinois street beginning fifty feet south of the north line of Louisiana street (the first street north of said station) and extending south for the distance of two hundred and ten feet, and also vacated a portion of McNabb street; that is to say, a strip thirty-five feet in width off the north side of said street. Soon after so vacating said streets, the appellee tore down its stationhouse and built anew, extending its carsheds and buildings over that part of Illinois street so vacated, and inclosing that part of said street, and guarding the former north line of McNabb street with iron fences, and along the vacated portion of McNabb street, to within one foot of the center of said street, it constructed a grade above the old grade of the street, and placed thereon two 606 railway tracks. The north line of the appellants' property is ninety-six feet south of any of the obstructions as added to Illinois street, and the south line thereof is one hundred and fifty-six feet from any of such obstructions.

The walls guarding the southern entrance to said tunnel co-

cupy such part of Illinois street that on the west thereof there is a street bed of nineteen feet to the sidewalk curb, on the east there is a street bed of nineteen feet to the sidewalk curb, and on the north there is a street bed of twenty-three feet between the coping and the center line of McNabb street, thus leaving a passageway around the sides and ends of said tunnel. Since so closing Illinois street, the premises of appellants can be reached from the southern part of the city by the same streets and courses that formerly existed, and from the northern part of the city by the ways which existed formerly, excepting by the surface of Illinois street over said distance of two hundred and ten feet so vacated, and excepting that part of McNabb street so vacated. The appellants' property, and the block in which it is situated, are accessible from points on Illinois street north of the union station through said tunnel, or by cross streets to Meridian street, thence south on Meridian street to McNabb street, or South street, and thence west to Illinois street south of the vacated portion thereof. The changes occasioned by vacating the streets named have required persons who might desire to reach the property of the appellants from north Illinois street, or in passing from said property to north Illinois street, to travel the more inconvenient route through the tunnel, or the more circuitous route by the way of Meridian and McNabb or South streets, and in traveling McNabb street to be limited to the south sidewalk or to the street bed narrowed to twenty-five feet.

The appellants, making these altered conditions the basis of their claim for damages, sued the appellee in the 607 circuit court, and alleged a depreciation of the value of their property and property rights in the sum of thirty thousand dollars, and that, in the proceedings for said vacation, no damages had been assessed or tendered.

The lower court sustained a demurrer to the several paragraphs of complaint, and that ruling is here assigned as error.

Under the bill of rights, in the constitution of Indiana (Rev. Stats. 1881, sec. 57; Rev. Stats. 1894, sec. 57), which guarantees that "every man, for injury done him in his property, shall have remedy by due course of law," and under the common law, the appellants insist upon a right of recovery. Though the obstructions complained of are remote from the lines of their property, and do not encroach upon the street immediately in front of their property, and while they have ways of ingress and egress to and from their building and lots to and from the same directions formerly existing, it is contended that

the appellants, by virtue of their ownership of said property, have a property right in the streets at the points of obstruction; that the right to use the streets for access to their building and lots is a property right, not confined to the immediate front of their lots, and not dependent upon an ownership of the fee in the street in front of or remote from their lots, and that any destruction or impairment of that right is an injury for which they have a remedy.

The appellee concedes that under said constitutional guaranty, and under the common law, even in the absence of that guaranty, there is a remedy for an injury to one's property. It is conceded, also, that the appellants held, in addition to their property in the soil of their lots, a property right in the street, that is to say, the appendant right of access, or easement of access, in front of their lots, but it is maintained that under the ⁶⁰⁸ facts in this case, no legal injury exists, no property right of the appellants has been invaded, and, if any injury has been suffered, it is *damnum absque injuria*.

At least two cases in this state have defined the extent of that appendant property right of access.

In *Haynes v. Thomas*, 7 Ind. 38, it is said: "These decisions establish the principle, that besides the right of way which the public has of passage over a street, in a town or city, there is a private right, which passes to the purchaser of a lot upon the street, and as appurtenant to it, which he holds by implied covenant, that the street in front of his lot shall forever be kept open to its full width."

In the case of *Tate v. Ohio etc. R. R. Co.*, 7 Ind. 479, the court quotes the above passage from the case of *Haynes v. Thomas*, 7 Ind. 38, and says, in application of the principle to the facts of the case, that "the person, whether natural or artificial, causing the obstruction, is liable to the owners of the adjoining lots for the injury. It is thus carefully limited to those owning lots fronting on the street at the point of obstruction. That is the case made in the record. Such owners only seem to sustain special injury."

These cases, and probably others in this state, hold that this property right cannot be taken or obstructed, even with legislative sanction. We think we may safely assert, however, that the obstruction of the easement of access need not always be upon the immediate front of the lot whose owner is affected, but that if the obstruction, though remote, renders access to such lot impossible, or impairs it in a substantial manner at the

point where it abuts upon the street, the property right of the lotowner is invaded, and he may recover. To illustrate this proposition: If a street were fully obstructed on either side of one's lot, so that the lines of the lot ⁶⁰⁹ could not be reached, access would be denied to the lotowner, though the street in front of his lot had upon it no obstructions. The property rights of the lotowner as against the public are coterminous with the lines of his lot, but that property right may be obstructed and its uses defeated, by cutting off ingress and egress to and from such lines from points upon the street beyond such lines. In such case there should be, and is, a remedy. This conclusion is held in the case of *Pennsylvania Co. v. Stanley*, 10 Ind. App. 421, where the remote obstruction of an alley created a cul de sac, which it was necessary to enter to gain access to the plaintiff's abutting lot, but from which there was no exit. The holding of the case cited finds support from the rule, as to the character of interest of the lotowner in the street, as stated in *Indiana etc. Ry. Co. v. Eberle*, 110 Ind. 542; 59 Am. Rep. 225; and see *Buhl v. Fort etc. Co.*, 98 Mich. 596 (608). *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749, is cited by appellants as enlarging the property rights of a lotowner in the street beyond that stated by us, and as carrying it throughout the length of the street. In that case, it was held that one who dedicates a street, as part of an addition to a city, and sells a lot with reference to such street, his grantee takes, by implied grant, such an interest in the street so dedicated as that said grantor could not vacate the street and thereby defeat that implied grant. No question is there made as to the rights of the public in such street, nor as to municipal control as against such grantee. The importance of a distinction between the two cases is manifest, when we suggest that the appellants could not be reasonably held to possess property rights in Illinois street three miles north of the union station, the obstruction of which would entitle them to damages, nor could it be said that ⁶¹⁰ they might defeat, at that distant point, the construction of a viaduct, a tunnel, or an elevated railway, as an impairment of their easement.

There is, however, this limitation upon every right of action of this class, that the plaintiff must suffer an injury different in kind, and not simply in degree, from that suffered by the community in general: *Decker v. Evansville etc. Ry. Co.*, 133 Ind. 493; *Fossion v. Landry*, 123 Ind. 136; *Indiana etc. Ry. Co. v. Eberle*, 110 Ind. 542; 59 Am. Rep. 225; *Terre Haute etc. R. R. Co. v. Bissell*, 108 Ind. 113; *Sohn v. Cambern*, 106 Ind. 302; *Dwenger*

v. Chicago etc. Ry. Co., 98 Ind. 153; Pennsylvania Co. v. Stanley, 10 Ind. App. 421.

This rule, with a definition of the phrase, "community in general," was recently stated by this court in the case of Decker v. Evansville etc. Ry. Co., 133 Ind. 493, as follows: "Whether a lotowner abutting upon a street may maintain a common-law action, where a structure in the street imposes no new burden on the soil owned by him, depends upon whether or not the occupation of the street with such structure results in damage to his property peculiar and different in kind from that which is suffered by the community in general. . . . The community in general does not mean those who use the street, and yet reside at such a distance from the railroad, if such be the obstruction of which complaint is made, as to suffer none of the annoyances incident to its construction and operation, but it means those who reside in the immediate vicinity of the railroad, and are subject to the inconveniences incident to such a structure. The location and operation of a railroad upon a public highway may occasion incidental inconvenience to an abutting landowner, but until it cuts off or materially interrupts his means of access to his property, or imposes some additional burden on his soil, his injury is the ⁶¹¹ same in kind as the community in general. Injuries which result from the careful construction and operation of a railroad on the land of another are common to all those whose lands are in close proximity to such road, and for such injuries there can be no recovery, in the absence of a statute entitling the owner to maintain such action: Grand Rapids etc. Ry. Co. v. Heisel, 38 Mich. 62; 31 Am. Rep. 306; Chicago v. Union Bldg. Assn., 102 Ill. 379; 40 Am. Rep. 598; Rigney v. Chicago, 102 Ill. 64; Indiana etc. Ry. Co. v. Eberle, 110 Ind. 542; 59 Am. Rep. 225."

The same statement of the rule and the same definition were given by the late Judge Mitchell, of this court, in Indiana etc. Ry. Co. v. Eberle, 110 Ind. 542; 59 Am. Rep. 225.

The reason of the rule was stated in Fossion v. Landry, 123 Ind. 136, by a quotation from Blackstone's Commentaries, book 3, page 219, to the effect that only private ways have private remedies, while public ways are the subjects of indictment only, and that special injury not suffered in common with the public must appear before private remedy may be employed.

The inquiry arises, upon the facts and the rules of law as stated, Did the appellants sustain an injury, substantially impairing or destroying access to their lots and building, from the

remote obstructions of Illinois and McNabb streets? If this inquiry were confined to McNabb street, and if the property of the appellants were upon the south side of that street, the decisions in this state would require us to answer this inquiry in the negative: *Dwenger v. Chicago etc. Ry. Co.*, 98 Ind. 163; *Terre Haute etc. R. R. Co. v. Bissell*, 108 Ind. 113; *Indiana etc. Ry. Co. v. Eberle*, 110 Ind. 541; 59 Am. Rep. 225; *Decker v. Evansville etc. Ry. Co.*, 133 Ind. 493.

In *Indiana etc. Ry. Co. v. Eberle*, 110 Ind. 541, 59 Am. Rep. 225, the facts were as above supposed, and, after a full consideration of the question and of many authorities, it was held that in the location and ⁶¹² proper operation of a railroad upon that side of the highway remote from the plaintiff's lot, there was no material interruption of the plaintiff's means of access; that "his injury and damages, while different in degree, are the same in kind as are those of the community at large"; and it is said: "All that is found is, that the obstruction forces the travel over the highway nearer his lot, and makes access thereto more difficult and inconvenient. That, however, does not show that the erection of the embankment presents any substantial interference with his right of access over the highway as it was previously enjoyed and used, nor does it show any inconvenience of a kind different from that to which the community at large is subjected. The highway may be more difficult and inconvenient of passage at that point by all who use it, precisely as it is inconvenient as a means of access to the plaintiff's lot. That the plaintiff, on account of the proximity of his residence, and because he uses the highway more frequently, may suffer inconvenience greater in degree than others, may be conceded. . . . Mere inconvenience or disadvantage, so long as the obstruction complained of does not, in some substantial degree, impair or deprive the plaintiff of the usual and ordinary means of access to his property, cannot give a right of action: *Cummins v. Seymour*, 79 Ind. 491; 41 Am. Rep. 618; *Powell v. Bunger*, 91 Ind. 64; *Lansing v. Smith*, 8 Cow. 146."

In *Terre Haute etc. R. R. Co. v. Bissell*, 108 Ind. 113, a case like that above supposed with reference to McNabb street, it was said: "In the absence of any showing that the tracks of the appellant's railroad were located, constructed, and used on and over that part of First street of which the appellee claimed to be the owner in fee, the grievances whereof he complained, caused or occasioned by the occupation ⁶¹³ and use of First street for railroad purposes, were such incidental injuries merely as he sus-

tained in common with the public, and not different in degree or character from those sustained by the public generally. For such injuries appellee cannot maintain an action against the appellant: *McCowan v. Whitesides*, 31 Ind. 235; *Cummins v. Seymour*, 79 Ind. 491; 41 Am. Rep. 618; *Matlock v. Hawkins*, 92 Ind. 225; *Dwenger v. Chicago etc. Ry. Co.*, 98 Ind. 153."

It will be observed that in the cases cited the rule was extended, not only to the maintenance of an obstruction, but also to the not unlawful operation of a railway, while, in the present case, there is no allegation of improper operation of the railways, and the rule applies to the appellants with additional force, when it is remembered that their lots and building do not abut upon McNabb street, and they are only affected by an inconvenience in traveling to and from their premises, an inconvenience suffered alike by all of the community.

By the cases cited, the rule that added inconvenience from such obstructions in the street, upon the side of the center line of the street remote from the property and not upon the property owner's fee, is *damnum absque injuria*, has become so firmly settled in this state that only legislative action can disturb it. It is, therefore, unnecessary to inquire as to the rule in other states or in England, as we are asked to do.

The rules so found, in the absence of direct authority upon the question, would lead with unerring certainty to a decision of the remaining question, namely, the effect of the obstruction upon Illinois street. The easements of access, of light, and of air, are all confined to the street in front of the lot, and when it is ascertained that a remote obstruction does not affect these, there is no injury, in a legal sense, any more than in the cases above stated ⁶¹⁴ of obstructions in front of the lot, and when it is established that a mere inconvenience of access, or a more circuitous route of access, does not constitute legal injury, no right of action exists.

But we need not stop with the application of our own cases since the direct question has been decided against the contention of the appellants in numerous cases from other states, involving like obstructions and like injury, and where all of the contentions made in this case were denied: *Buhl v. Fort Street*, 98 Mich. 596; *Stanwood v. Malden*, 157 Mass. 17; *McGee's Appeal*, 114 Pa. St. 470; *East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795; *Parker v. Catholic Bishop of Chicago*, 34 N. E. Rep. 473; *Glasgow v. St. Louis*, 107 Mo. 198; *Smith v. Boston*, 7 Cush. 254; *Whitsett v. Union Depot etc. Co.*, 10 Col. 243; *Houck v. Wach-*

ter, 34 Md. 265; 6 Am. Rep. 332; Polack v. Trustees, 48 Cal. 490; Gerhard v. Seekonk River etc. Commrs., 15 R. I. 334; Kings County etc. Co. v. Stevens, 101 N. Y. 411; Coster v. Mayor, 43 N. Y. 399; Barr v. Oskaloosa, 45 Iowa, 275; Heller v. Atchison etc. R. R. Co., 28 Kan. 625.

The last of these decisions is by Mr. Justice Brewer, and is perfectly clear in maintaining the proposition that one whose access is not cut off, and whose property rights, in the immediate front of his lot, are not invaded, and who suffers only from the loss of convenience of access, which of itself may turn the tide of travel from his premises, occasions loss of business and depreciation in value of property, sustains damage of the same kind, but in greater degree, than that sustained by the public generally.

We have not endeavored to collect all of the cases holding this view, but have included, as will be observed, the decisions of many states. We concede that the holding of some of the courts of this country are not in harmony ^{with} this, the great weight of authority, and it would seem that the English rule, urged by appellant's learned counsel, cannot be reconciled with the current of authority in this country, but that rule has met with frequent criticisms in the cases we have cited, and is in some justified under acts of parliament.

However, we are constrained to hold with the best American authority, even if the conflict with the English rule were sharply drawn and free from distinctions.

There is in this country a line of holdings which is sometimes thought to conflict with what we have said to be the current of authority, namely, those cases which include the holding of liability for obstructions by elevated railways. These, however, should be distinguished as not having relation to access, but to the easement of light and air, and as encroaching upon the immediate lot front.

All of the cases we have cited, to the question now under consideration, involved the vacation of one or more of several avenues of access, and left other avenues which required a more circuitous course in reaching the property of the plaintiff. In several of the cases, provisions of the state constitutions and statutes, reserving damages for the taking of or injury to property, were considered as not allowing damages, where the injury was of the character suffered by the community in general. In some of the cases, it is urged, as it has been in this case, that, if instead of vacating the street the proceeding had been to establish

a street, the appellants would have been subject to assessment for benefits therefrom, and for that reason they would be entitled to damages. It was held not to affect the question: *Buhl v. Fort Street*, 98 Mich. 596; *Stanwood v. Malden*, 157 Mass. 17; *East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795; *Kean v. Elizabeth*, 54 N. J. L. 462; *Chicago v. Union Bldg. Assn.*, 102 Ill. 379; 40 Am. Rep. 598.

In the case of *Kean v. Elizabeth*, 54 N. J. L. 462, it was said in this connection: "It is assumed by counsel for prosecutrix, that because the prosecutrix was assessed for a benefit resulting from the opening of this street peculiar to herself, that she got a vested right in the continued existence of the street, of which she could not be stripped without compensation. But this, I think, is more plausible than substantial. While the right she got may have been of peculiar benefit to her property, yet it was a right which she shared with the public. The privilege of using the street was shared by each member of the community. It may not have been of the same value to each member of the community, but the right to use the street was in each citizen the same. It was exclusively a public right, put under the control of the representatives of the public. It was subject to alteration or abolition when, in the judgment of those to whom the public interests were confided, those interests demanded such action. The assessment of benefits is presumed to be based upon the recognized power of the state and its agencies to modify or destroy the improvement."

It has been suggested by counsel for the appellant that the question, as to whether there has been an injury, is one for the jury under proper instructions. The question has, with but few, if any, exceptions, arisen upon demurrer to the petition, as it does in this case. A statement of the facts, submitted and tested by the rules of pleading and principles of law, which otherwise would be given as charges to the jury, constitutes the case and calls for judicial determination as a question of law. As to whether one whose access was not cut off by the vacation of a part of a street may recover has been expressly held to be a question of law: *East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795; *Stanwood v. Malden*, 157 Mass. 17.

It should be conceded, of course, that if legal injury is pleaded, the degree of that injury, in ascertaining the amount of recovery, may be submitted to the jury, but as to whether a legal injury is pleaded is a question of law for the court.

In the absence of authority from other states there could be no

escape from the conclusion that our court has gone so far in the direction we have shown as to deny a recovery by the appellants. They have ample means of access to their property, and the vacations complained of do not affect the access to their lot front, but are remote from it. If they have suffered in the depreciation of the value of their property by the inconvenience of the public travel to reach it, or of the appellants to reach other parts of the city, that inconvenience is suffered alike by all who may desire to go to the appellant's property, or from that property to other parts of the city. It is, therefore, an injury suffered in common by the appellants and the public in general, though the degree of appellant's injury may be, and probably is, the greater.

We conclude that the circuit court did not err in sustaining the appellee's demurrer to the complaint, and the judgment is affirmed.

HIGHWAYS—OBSTRUCTION OF ACCESS TO.—The owner of a lot fronting on a street, though he has no title in any part of the lands upon which such street is located, may sustain an action to recover damages resulting to him from an obstruction of the street, impairing, in a substantial degree, the light or accessibility of his premises: *Aberdroth v. Manhattan Ry. Co.*, 122 N. Y. 1; 19 Am. St. Rep. 461; *Longmont v. Parker*, 14 Col. 386; 20 Am. St. Rep. 277, and note. If damages are occasioned an abutting owner by an improvement made by a municipality in the street in front of his property, whereby ingress and egress to the premises are injuriously affected, this is a kind of injury, not common to the general public, for which the city is liable: *Pueblo v. Strait*, 20 Col. 13; 46 Am. St. Rep. 273, and note; *Selden v. Jacksonville*, 28 Fla. 558; 29 Am. St. Rep. 278, and note.

AM. ST. REP., VOL. L.—23

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

SCHROEDER v. FLINT & PERE MARQUETTE R. R. Co.

[103 MICHIGAN, 213.]

RAILROADS.—A FOREMAN OF A GANG OF MEN employed by a railroad company in unloading dirt from cars, who is under the immediate and direct control of a division roadmaster, is only a fellow-servant with each of the other members of the gang, whether he is authorized to hire and discharge or not. Therefore, none of them can recover of the common master for the foreman's negligence.

Hanchett, Stark & Hanchett, for the appellant.

Northup & O'Donnell, and J. A. Muir, for the appellee.

214 GRANT, J. The liability of the defendant, the Flint & Pere Marquette Railroad Company, under the instructions of the court, depends upon the position occupied by Mehalski, the boss or foreman of a gang of ten men, who were occupied in unloading and leveling the dirt hauled upon its premises by the defendant, the Chicago & Grand Trunk Railway Company. The sole negligence alleged as ground for recovery against the Flint & Pere Marquette road is that Mehalski failed to give notice to his coemployés that the train was about to move. Before discussing this question, I desire to state that, in my judgment, this accident could not possibly have happened, without the negligence of the plaintiff himself, if the trainmen of the Chicago & Grand Trunk road had performed their duty. It was established beyond controversy, by the testimony of witnesses and by the rules of the company, that it was the duty of the trainmen to give warning of the moving of the train, and to see that both the "track and the train were clear," and that it was the duty

of the rear brakeman to be in his place on the rear car when the train moved. The case against the Grand Trunk company was withdrawn by the plaintiff before it was submitted to the jury, and he was permitted to recover on the ground of the negligence of the Flint & Pere Marquette company.

If Mehalski was not the defendant's alter ego, then it is not liable. He occupied the usual position of boss or foreman of a gang of men. His duties were no other, or different, or greater, than those of the foreman of the ordinary section gang upon a railroad. In all such cases, some one of the men employed must be invested with authority to direct the work. He kept the time, counted the number of cars, directed the men where and how to work, ²¹⁵ saw that they did their work properly, directed the place where the train should stop for unloading, notified the men when to cease leveling and go to unloading, and then assisted in doing the work. He was under the immediate and direct control of Mr. Cole, a higher official of the defendant, who was often present, sometimes daily, superintending and directing the work. I do not think there was any legitimate evidence tending to show that he was invested with authority to hire and discharge men. He certainly had not done it before the accident, and was not given express authority until long afterward. But whether he did or did not have such authority I consider of little consequence. The power to hire and discharge is not conclusive, and is, in many cases, of little moment. Too much prominence has often been given to this authority. One may possess it and still not be the alter ego, or he may not possess it and still be the alter ego.

The doctrine of nonliability for the negligence of a fellow-servant is so firmly established, and has been so frequently affirmed, in this state, that I deem it unnecessary to cite the authorities. The difficulty has always been in determining whether the servant whose negligence caused the injury was, under the facts of each case, the alter ego or a fellow-servant. The perplexity and difficulty of the question have been recognized in the decisions of this court, and it is quite possible that there may be some difficulty in harmonizing them all; but the rule recognized in nearly if not all of them is thus stated by McKinney on Fellow-Servants, section 23:

"The true test, it is believed, whether an employé occupies the position of a fellow-servant to another employé, or is the representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offend-

ing servant, by which another employé is injured; or, in other words, ²¹⁶ whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master."

This principle is so exhaustively and carefully discussed by my Brother Hooker in *Beesley v. Wheeler*, 103 Mich. 196, that further discussion here is unnecessary. The authorities are there cited and commented on. I concur in his reasoning and the conclusions reached.

One of the principal cases relied upon by the plaintiff is *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180. In that case, my Brother Long, speaking for the court, expressly recognized this rule in the following language: "It is not to be determined solely from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant. If it is an act that the law imposes the duty upon the part of the master to perform, then the offending employé is not a fellow-servant, but a superior or agent, for whose acts the master is held liable. Again, if the master has delegated to a servant or employé the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master, then such superior servant stands in the place of the master, and the rule of *respondeat superior* applies."

To hold *Mehalski* the alter ego would result, in my judgment, in the virtual abrogation of the rule. It would establish the doctrine that where a farmer employs a competent ditcher to construct a drain upon his farm, or a foreman to harvest his crops, or a carpenter to build him a barn or other building, he is responsible for their negligent acts, notwithstanding that he has employed competent men and furnished proper tools, material, and machinery; and that every foreman in a manufacturing plant, and every boss of a railroad gang, is a vice-principal. It would result in overruling the following cases: ²¹⁷ *Quincy Min. Co. v. Kitts*, 42 Mich. 34; *Hoar v. Merritt*, 62 Mich. 386; *Peterson v. Chicago etc. Ry. Co.*, 67 Mich. 102; 11 Am. St. Rep. 564; *Adams v. Iron Cliffs Co.*, 78 Mich. 271; 18 Am. St. Rep. 441; and the many other cases in which this rule has been recognized and affirmed.

Plaintiff relies upon the following authorities to support his right of recovery: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180; *Ryan v. Bagaley*, 50 Mich. 179; 45

Am. Rep. 35; Erickson v. Milwaukee etc. Ry. Co., 83 Mich. 281; 93 Mich. 414; Shumway v. Walworth etc. Mfg. Co., 98 Mich. 411; Hunn v. Michigan Cent. R. R. Co., 78 Mich. 513.

In Harrison v. Detroit etc. R. R. Co., 79 Mich. 409, 19 Am. St. Rep. 180, which, as already shown, approves the rule as above stated, a division superintendent, who had the entire charge and control of a division of the road one hundred and fifty miles in length, was held to be the alter ego.

In Ryan v. Bagaley, 50 Mich. 179, 45 Am. Rep. 35, the defendant, the owner of the mine, lived in another state, and the entire management, control, and conduct of the mine in its operation was delegated to the mining captain. That case was tried before the writer of this opinion as the circuit judge, and the charge to the jury upon this point was as follows: "It appears from the testimony that he had the entire charge and control of the underground work, and all the work generally, of the mine, and that he employed and discharged men. Now, I charge you that Captain Whitesides, if he had this power delegated to him to manage and control the mine, negligence on his part would be the negligence of the owners or managers of the mine. So, if he directed the hoisting of this pipe, and the act alone of hoisting it was negligence, then the owners of the mine would be liable. If he did not direct how it should be done, but simply instructed Mr. Tyler to hoist the pipe, and Tyler, in his trying it, did it negligently and carelessly, that would not be the act of the defendants or Mr. Whitesides."

In Shumway v. Walworth etc. Mfg. Co., 98 Mich. 411, it was conceded by the defendant that the relations of the agent to the defendant were such that he might in law, for some purposes, ²¹⁸ be regarded as the representative of the master, but it was insisted that in the particular act of starting the machine he was acting as a fellow-servant. The officer of the defendant had the entire charge of the factory, as well as the employment and discharge of men. This was evidently a case of the delegation of the entire control to the agent, who was held to be a vice-principal.

In Erickson v. Milwaukee etc. Ry. Co., 83 Mich. 281, 93 Mich. 414, stress was laid upon the fact that the foreman, Moleski, who had full charge of the gravel train, and complete control over employes working under him, with full power to hire all laborers and to discharge them, and to whom alone complaint could be made, placed the plaintiff in a position of danger, to which he was not accustomed, and for which he was not hired. Both the opinions in that case were also written by Mr. Justice

Long, and the superior servant was held to be the alter ego, under peculiar facts which showed an extensive authority conferred by the principal upon its servant. I assented to that opinion without any thought of abrogating or infringing upon the above rule so firmly established by a long line of decisions in this and other courts, and so well grounded in reason.

In *Hunn v. Michigan Cent. R. R. Co.*, 78 Mich. 513, the train dispatcher had absolute control over the running and operating of trains from Rives Junction to Mackinaw. This case also recognizes the general rule above stated, and the difficulty inherent in determining whether the facts of any case bring it within the rule.

Whatever criticisms may be made upon the soundness of these decisions, it cannot be said that the court intended to abrogate the rule of nonliability for the negligence of a fellow-servant in every case of superior authority, nor that they apply to or govern the facts of the case at bar. This rule is well settled, and in every case the question must be, Do the facts shown by the plaintiff bring his case ²¹⁹ within the rule? See *Peschel v. Chicago etc. Ry. Co.*, 62 Wis. 349.

I am of the opinion, therefore, that the judgment should be reversed, and no new trial ordered.

Ordered accordingly.

Long and Hooker, JJ., concurred with Grant, J.

MONTGOMERY, J. The plaintiff sues to recover for negligent injury. The defendant railroad company employed the Chicago & Grand Trunk Railway Company to deliver, upon its yard at Port Huron, dirt taken from the tunnel which the Chicago & Grand Trunk road was excavating for, which dirt was to be used by defendant in leveling its own yard. The defendant had nothing to do with the train, except to indicate to the conductor of the train where to place the cars for unloading. The plaintiff was engaged with a gang of men in the work of unloading the cars as they were placed in the yard. The gang of men was under the immediate charge of one Mehalski as foreman. Mehalski's authority consisted of directing the manner of unloading, and he also had authority, when given direction by his superior, Mr. Cole, to hire and discharge men. The testimony shows that Mr. Cole was the division roadmaster of the defendant road, and he had general charge and direction of the work of filling the yard. He gave instructions to Mehalski to keep the time and number of cars, and he gave directions in relation to the work. Mehalski, before increasing his force of men, con-

sulted and obtained the consent of Mr. Cole. With this consent, he had authority to keep up the number of the force by hiring men to take the place of those who left. While he did not exercise the power of discharging men at any time prior to the injury to plaintiff, he testifies that he supposed that he had the power to discharge men if they were not doing the work satisfactorily. He ²²⁰ testifies that he was under Mr. Cole's direction and charge; that Mr. Cole was there on the spot, sometimes twice a day, and sometimes only twice a week. "If he [Cole] saw the work was being done as he wanted, he would say, 'All right.' If it was something that did not satisfy him, he gave me instructions."

The injury was caused, as is claimed by the plaintiff, in the following manner: In the conduct of the business, when the men were leveling dirt in the yard, the signal for them to leave the work, and go at once to the cars and commence the work of unloading, was a call from Mehalski in the words, "Come on, boys." When the train was placed, the engine would be uncoupled and moved away. This custom was known to all the men. They came to unload whenever Mehalski called them, and not before. When he saw the train coming, he went on, and placed it where he wanted it to be unloaded, and then called the men. On the day in question, after the train which caused plaintiff's injury came into the yard, Mehalski, following the usual custom, called to the men by hallooing, "Come on, boys," and waved his hands. The men had previously been assigned in pairs to the cars on the train. Each knew his own car. The plaintiff was at work on the car furthest from the engine—the fifth car. The men had been working to the south of the train. The engine was on the north end of the train, and plaintiff's car would, therefore, be the first one reached by the laborers. Each of the men carried a pail of water, in which he dipped his shovel when the wet clay, which was very sticky, adhered to it. The train came. The conductor, under the order of Mehalski, placed it. In coming to the train from the south, plaintiff, who was assigned to the last car, went to the west side, that he might fill his pail with water from the pond. He got his water, and put it upon the car. At the time Mehalski hallooed and ²²¹ motioned to the men, the cars had stopped. Plaintiff saw the engine uncoupled and standing at a distance. When he got to the car, it stood about thirty feet away. It was there when he went for the water. It was standing in the same place when he started to climb up. It appears that Mehalski had been notified that the train was blocking the yard engine of the Flint & Pere Mar-

quette Railroad on another track, and was requested to have the mud train moved. Mehalski was then at the south end of the train, and, in answer to the request to move the train, he went up to the engine. As Mehalski went to the north end of the train to instruct the conductor to pull it ahead, the men were coming up to unload the train. The engine backed down and against the train, and the plaintiff received the injuries complained of. No warning was given by Mehalski. The plaintiff recovered, and the defendant brings the case to this court.

1. The most important question arises upon the instruction of the court upon the subject of whether the plaintiff and Mehalski were fellow-servants. Upon that question the circuit judge instructed the jury as follows: "If you find from all the evidence in the case that Jacob Mehalski had full power to hire and discharge men that were engaged in unloading this car, and that he had full control over these men in directing and managing their work in and about the entire business for which they were employed—that is, in receiving the train into the yard and placing the train, the unloading of the dirt and the leveling of it down, and the general direction of the work—then I instruct you, as a matter of law, that Jacob Mehalski was not a fellow-servant of the plaintiff."

It has been found difficult to lay down general rules for determining whether one who has some direction of a branch of business of the principal is to be deemed his representative or a fellow-servant, and much confusion has arisen from a misapplication of well-understood rules; and ²²² it may be said, also, that the confusion has most often arisen in determining the question with reference to the rank of the offending servant. In general we think the true test is, whether the person alleged to be a representative of the master is engaged in the performance of an act which it is the duty of the master to perform for the protection of his employes—such a duty as that of providing a safe place to work, and safe machinery and appliances; exercising due care in the selection of servants engaged in the same employment; giving proper direction as to use of dangerous machinery by inexperienced employes; and the establishment of proper rules and regulations for the conduct of the business. Where there has been neglect of any of these duties, whether the neglect is the personal neglect of the master or that of one intrusted by him with the performance of the duty, such neglect is attributable to the master; and this is generally true, without reference to the rank of the offending servant.

In *Fox v. Spring Lake Iron Co.*, 89 Mich. 387, the rule as stated by Chief Justice Church in *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545, is cited with approval. The rule as cited is as follows: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care, in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter . . . is liable for the manner in which they are performed": See, also, *Crispin v. Babbitt*, 81 N. Y. 516; 37 Am. Rep. 521; *Van Dusen v. Letellier*, 78 Mich. 492; *Morton v. Detroit etc. R. R. Co.*, 81 Mich. 423; *Roux v. Blodgett Lumber Co.*, 85 Mich. 519; 24 Am. St. Rep. 102; *Irvine v. Flint etc. R. R. Co.*, 89 Mich. 416; *Dewey v. Detroit etc. Ry. Co.*, 97 Mich. 329; 37 Am. St. Rep. 348.

In some jurisdictions, this is the limit of the liability of the master in all cases, and it is held that an employé²²³ or servant may occupy a dual position—that he may represent the master and stand in his place as to certain acts, and in other acts be simply a fellow-servant: See *McKinney on Fellow-Servants*, sec. 42. And, within certain limits, this rule has been applied in this state: See *Hunn v. Michigan Cent. R. R. Co.*, 78 Mich. 513; *Fox v. Spring Lake Iron Co.*, 89 Mich. 387. But it has also been held by this court that where the master places the entire charge of the business in the hands of an agent, exercising no authority therein, he may be liable for the negligence of such agent to a subordinate employé. This rule is recognized in *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180; *Ryan v. Bagaley*, 50 Mich. 179; 45 Am. Rep. 35; *Erickson v. Milwaukee etc. Ry. Co.*, 83 Mich. 281; *Shumway v. Walworth etc. Mfg. Co.*, 98 Mich. 411. See, also *Bailey on Master's Liability*, 270; *Cooley on Torts*, 562; *Sell v. Reitz Lumber Co.*, 70 Mich. 479; *Erickson v. Milwaukee etc. Ry. Co.*, 93 Mich. 414; *Lyttle v. Chicago etc. Ry. Co.*, 84 Mich. 289.

It remains to be considered, then, whether the negligence of *Mehalski* in the present case was the neglect of a duty which the master owed to the servant, and could not delegate to a fellow-servant, and, if this be answered in the negative, whether, within the rule established in this state, the entire management of the business, or a particular branch thereof, had been delegated to *Mehalski* in such sense as to make him the alter ego or vice-principal of the defendant. We think it very clear that the act which

Mehalski was performing was not one which the master owed the duty of performing in such sense that he could not delegate it to a fellow-servant of the plaintiff. The act which he performed or neglected—that of giving notice of the intention to move the engine—was such a one as might be, and generally is, intrusted to subordinates, and related to the mere operation of the business in its details. There was no defect in machinery. There was no negligence in the employment of servants. The injury did not result from the failure to properly instruct an inexperienced ²²⁴ servant, nor did the injury result from a want of general rules for the management and conduct of the business. It was plainly, therefore, the neglect of a fellow-servant, unless it can be said that Mehalski was the vice-principal or alter ego of the defendant. If the superior servant has complete control of the business of the master, or a disconnected branch thereof, the master is liable for the negligence of the superior servant—in that case called the “vice-principal”; and this, without regard to whether the negligence is a failure to perform a duty which, upon other grounds, the law casts upon the master. This liability is apparently based upon the ground that the risk of personal negligence of one standing in such relation to the master that he can be called the master’s other self is not undertaken by the servant: See cases above cited. Mere superiority in grade does not constitute a foreman the vice-principal, unless his authority is exclusive in his department. Did Mehalski occupy that relation to the defendant’s business?

In the case of *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180, Light, an assistant roadmaster, was held to be the vice-principal, on the ground that the entire charge of a distinct branch of the business was, for the time being, in his hands as agent, the master exercising no discretion and no oversight. It was said: “He, in fact, controlled that entire division absolutely, so far as employing and discharging the men was concerned. . . . Doyle [his superior] was not present at the time of the injury, and the fair inference is, that whatever power Doyle would have had, if present, Light had like power, and represented the defendant company as fully as Doyle would have done. He did no manual labor himself, but had the full oversight, care, and management of it.”

In *Hunn v. Michigan Cent. R. R. Co.*, 78 Mich. 513, it was said: “The master may not choose to give his personal attention ²²⁵ to his business, and may desire to put another in his place, to man-

age and control it for him as fully as he might do if personally present. Such person is his alter ego, and the master is as responsible for his acts of omission and commission, while engaged in the business intrusted to him, as if he did such acts himself. . . . Whenever the business conducted by the person selected by the master is such that the person selected is invested with full control (subject to no one's supervision except the master's over the action of the employes engaged in carrying on a particular branch of the master's business, and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employes to obey, then he stands in the place of the master, and is not a fellow-servant with those whom he controls": See, also, *Lyttle v. Chicago etc. Ry. Co.*, 84 Mich. 295.

In the present case, while Mehalski was acting under the general instructions of Cole, the jury have found that he (Mehalski) had full control of the men employed, and directed and managed their work in and about the entire business in which they were engaged, with full power to hire and discharge men engaged in the work. If the facts were so, the plaintiff and Mehalski were not fellow-servants. The fact that Mehalski was subject to general directions by another cannot be held conclusive. For the time being, every power and all authority which the master could exercise were vested in Mehalski, including the power of enforcing his authority by a discharge of the men employed. We think, within the rule established in this state, the instructions of the circuit judge, if supported by the evidence, must be upheld.

But it is said that there was no evidence that Mehalski had the power to discharge men. On cross-examination Mehalski testified: "It was my duty to see that the men did their work properly. If they did not, I would discharge them."

226 On redirect he testified: "Mr. Cole had given me authority to discharge men. He said, if men were no good, to discharge them. That was about two months after we commenced work there."

As this date was later than the date of the injury to plaintiff, it is contended that there was no authority at the time of the injury. But the witness further testified on redirect: "I had talked with him many times before that about discharging men, and was acting under his direction about that."

On recross-examination he testified: "If any left, I had authority to hire men in their places, but would not have authority to

take any greater number than ten without getting authority from Mr. Cole. He told me, if they would not work, to let them go. I considered I had a right to discharge a man if he was not doing good work."

We are satisfied that it was properly left to the jury to say whether, at the time of the injury to the plaintiff, Mehalaki had authority to hire and discharge men.

2. There was testimony from which the jury would be justified in inferring that the plaintiff attempted to get upon the car after it was in motion. While the testimony upon this point was meager, yet it was such that the jury might have been justified in acting upon it. One Reynolds, a witness for defendant, testified: "Van Patten gave the signal to back up and couple on, and pull the train ahead. There was no jerking of the train. Just as they started, I saw plaintiff step between the cars. He put his pick and shovel and pail onto the car, and then put his hands, one on each car, and tried to step on the brakebeam. There would not be much slack in the train that a person would notice, because they started so slow. I watched the man, and the next I saw of him his foot was run over. I did not see him when he fell."

227 In view of this testimony, defendant asked an instruction as follows: "In order to recover, the plaintiff was required by law to exercise care to avoid getting upon the cars, or to attempt to get upon the cars, while they were being moved, or while they were likely to be moved, so as to endanger his safety in getting upon them; and if, by his own want of care, he contributed to receiving the injury of which he complains, he cannot recover against the defendant."

We think this instruction should have been given. It was peculiarly proper in this case, for the reason that the injury is alleged to have occurred through a failure to notify the plaintiff of the fact that the train was about to move. If, then, the plaintiff's attempt to get aboard the car was made after the train was in motion, it cannot be said that the neglect of the duty to notify him that the train was about to move was the proximate cause of the injury. Nor are we able to say that the charge of the circuit judge, given on his own motion, cured the error. It is true, the court laid down correctly the general rule, that the plaintiff must show that he in no way contributed to the injury complained of; but the instructions did not touch the precise point covered by the request to charge, and the defendant was entitled to an instruction upon this specific point:

Willey v. Crane, 69 Mich. 17; Miller v. Miller, 97 Mich. 151; Babbitt v. Bumpus, 73 Mich. 331; 16 Am. St. Rep. 585.

3. The circuit judge further charged the jury that if they should find that Mehalski, after he had given the order to the men to come on and get upon the cars, and while the plaintiff was about to climb upon the cars, ordered the engine coupled onto the train to move it, and did not warn the plaintiff, or notify him in some way, that the train was about to be moved, and the engine was backed down and coupled onto the train and moved in obedience to the orders of Mehalski, and, in the moving of ²²⁸ the train, the plaintiff was thrown down and run over, and received the injuries complained of, and if the jury should find that the proximate cause of the injury was the failure of Mehalski to notify the plaintiff that the train was about to be moved, then the plaintiff would be entitled to recover. This instruction implies that the failure of Mehalski to notify plaintiff of the intended movement of the train was negligence as matter of law. While it was clearly a fact from which the jury might have inferred negligence, yet we think it should have been left to the jury to determine whether, in view of the custom of giving notice by Mehalski, and the custom of ringing a bell and blowing a whistle by those in charge of the train, the failure of Mehalski to give notice on the occasion in question was or was not negligence.

There are no other questions presented which would be likely to arise upon another trial.

The judgment should be reversed, with costs, and a new trial ordered.

McGrath, C. J., concurred with Montgomery, J.

RAILROADS — FELLOW-SERVANTS. — A SECTION FOREMAN who has control of a gang of track repairers is not a vice-principal as to the men under him, and the railroad company is not liable for his negligence, resulting in an injury to one of them: Spancake v. Philadelphia etc. R. R. Co., 148 Pa. St. 184; 33 Am. St. Rep. 821, and note with the cases collected.

BOWDLE v. DETROIT STREET RAILROAD COMPANY.

[103 MICHIGAN, 272.]

WITNESSES—MENTAL COMPETENCY.—If preliminary objection is made that a witness is not mentally competent to testify, the court must examine him and hear such testimony as is proper in regard to his mental condition, and determine if he is competent to testify. If the court so decides, the weight of the testimony of the witness is for the jury to determine.

WITNESSES—MENTAL COMPETENCY.—If, after a witness has testified, evidence is introduced of his mental incompetency to testify, the jury must determine such competency, as well as the weight to be attached to the testimony of such witness.

WITNESSES—MENTAL COMPETENCY.—A person affected with insanity is competent as a witness, if he has sufficient understanding to comprehend the obligation of an oath, and is capable of giving a lucid account of such matters as are in dispute.

HUSBAND AND WIFE—DAMAGES FOR LOSS OF SERVICES.—A husband suing to recover for an injury sustained by his wife through negligence, and alleging that since the accident he has been deprived, and during the life of the wife will be deprived, of her fellowship, society, aid, comfort, and assistance in his domestic affairs, can recover only the value of such services as the wife would have been likely to render in the discharge of her domestic duties.

HUSBAND AND WIFE—LOSS OF SERVICES.—The fact that a wife lives with her mother, and that her husband is not able to support her in her injured condition, does not prevent him from recovering for the loss of her services, caused by an injury to her through the negligence of a third person.

NEGLIGENCE—PROXIMATE CAUSE.—In an action to recover for personal injury sustained while alighting from a street-car, and alleged to have been caused by the negligence of the defendant in suddenly starting the car while the injured passenger was standing on the steps, and in permitting a hook to hang near the steps of the car, thereby catching and dragging such passenger, the defendant can exonerate himself from liability only by proof of the absence of negligence on his part, and that the hook being recently displaced by another passenger was the sole and proximate cause of the accident.

Moore & Moore, for the appellant.

S. T. Miller and Brennan & Donnelly, for the appellee.

274 GRANT, J. 1. The principal question in this case arises upon the following instruction of the court to the jury: "I allowed this testimony to be introduced as to the mental condition of this woman for the purpose of showing you, or allowing you to judge, as to how long her husband might be deprived of her society, or of her labor as a wife, in the discharge of her domestic duties in the household, and for no other purpose. You are at liberty to investigate all the proof in this case that has been of-

ferred to you as to whether this woman is sane or insane. I charge you that, if you shall find that now this woman is without sufficient mental capacity to understand what is going on, you are not at liberty then to consider her testimony in this case at all, for you are only at liberty to consider the testimony of a person who is *compos mentis*, or of sound mind; for a person who is without sound mind, capable of remembering or giving testimony in a case, is not to be allowed in a court of justice. One of the physicians here testified that she was insane now. If you shall come to that conclusion, then you are not at liberty to regard her testimony at all in this controversy; but if you shall have arrived at the conclusion that she is sane now, and capable ²⁷⁵ of knowing what she is doing and saying, and of remembering what transpired at the time this accident occurred or this injury happened, then you are to consider her testimony, and you are at liberty to consider it in connection with the permanent character of this injury, and also in weighing the testimony of the expert witnesses who have been produced in this case, who, there is some evidence to show, testified on a previous occasion that this woman would be permanently insane."

No question was raised as to the competency of this witness at the time she was sworn, nor at any time during the giving of her testimony. One of the grounds upon which recovery was sought by the declaration is that she had become "completely and permanently insane." If such preliminary question had been raised, it would then have been the duty of the court to examine her, and such testimony as was proper in regard to her condition, and determine whether she was competent to be sworn. Some authorities have said that the preliminary question in such cases is, "Is the witness capable, when sworn, of understanding the nature of an oath?" To this some authorities add that he must be able to understand the subject with respect to which he is required to testify. When this preliminary question is passed, and the court has determined that the witness is competent to testify, the entire controversy is then transferred to the jury. The court may not say to the jury that the witness is or is not entitled to credence. The jury may reject the testimony entirely or may attach whatever weight to it they choose. We are cited to no authority which holds that it is incorrect to instruct the jury that, if they shall determine from the evidence that a witness is so insane as not to comprehend or be able to understand what she is doing and saying, and to remember what has transpired in regard to the subject about which she is testi-

fyng, they should reject her testimony altogether. Such holding, in ²⁷⁶ my judgment, would be a clear usurpation of the province of the jury. It would, in effect, be saying to them, "The witness is entitled to some credence, and it is for you to say how much." The preliminary decision of the court means nothing of the kind. The court simply decides that the witness is competent to testify, upon testimony not introduced for the consideration of the jury, but of the court. Afterward, as in this case, testimony is introduced as to her mental condition, and her own testimony and demeanor and appearance are before the jury, and the question of her competency must then be determined by them, when the evidence is conflicting.

It is entirely clear that one clause of the instruction, standing alone, would be error, viz: "One of the physicians here testified that she was insane now. If you shall come to that conclusion, then you are not at liberty to regard her testimony at all in this controversy."

The language following, however, restricts the above, and clearly conveys the meaning of the learned circuit judge, viz., that if she was then capable of knowing what she was doing and saying, and remembering what transpired at the time of the accident, then the jury were to consider her testimony. In determining the question, the jury were further very properly told that they must consider all the testimony in the case, and, if they found that she was capable of understanding, they should give her testimony due weight; if they found, on the contrary, that she was not, then they should reject it. I think this states the true rule.

In *Regina v. Hill*, 5 Eng. L. & Eq. 547, speaking upon this precise question, the court said: "If his evidence had, in the course of the trial, been so tainted with insanity as to be unworthy of credit, it ²⁷⁷ was the proper function of the jury to disregard it and not to act upon it."

This is quoted in *Coleman v. Commonwealth*, 25 Gratt. 876, 18 Am. Rep. 711, and is recognized as the sound and reasonable rule. This is the rule to be deduced from the language of the court in *Regina v. Hill*, 5 Cox C. C. 259. In that case Lord Campbell, C. J., says: "The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest." To the same effect are *Mayor of Gainesville v. Caldwell*, 81 Ga. 76, and *Worthington v. Mencer*, 96 Ala. 310.

The case of *Mead v. Harris*, 101 Mich. 585, is not in conflict with this rule. In that case, the preliminary question was raised before the witness was sworn, and the court said that he would instruct the jury that, if they found that the witness was mentally incompetent, they should consider her testimony of no value; and the decision went no further than to hold that it was the duty of the court to determine, in the first instance, whether the witness was competent to testify, before the question could be submitted to the jury. I do not wish to be understood as holding that it is competent to introduce testimony of insanity to impeach the credibility of a witness. That question is not involved. I find no error in this instruction of the court.

2. Two grounds of negligence were alleged: 1. That the car was negligently started while plaintiff's wife was standing on the last step; 2. That the chain with a hook at the end was negligently permitted to hang from the platform near the steps.

²⁷⁸ The court instructed the jury that, if the hook was in the proper place when the car left the city hall, and was displaced by Mrs. Bowdle or some other passenger, and by hanging caught Mrs. Bowdle's dress, then she could not recover. This charge would have been proper, if the court had further instructed the jury that the defendant would not be liable if the hook was the sole or proximate cause of the accident. But the instruction left out the other negligent act, viz., the starting of the car while she was still standing on the steps. Possibly the hook might not have caught her dress if she had alighted upon the street before the car started. If the starting of the car was the cause of her falling and of her being caught by the hook, it would be no defense to the action that the defendant was not responsible for the position of the hook and chain.

Upon the other questions involved we agree with the chief justice.

For this error the judgment must be reversed, and a new trial ordered.

Long and Montgomery, JJ., concurred with Grant, J.

Hooker, J., concurred in the result.

McGRATH, C. J. A husband sues for loss of his wife's services, by reason of an injury received April 1, 1891, while alighting from one of defendant's cars, and for expenses incurred by him in her treatment and care. In his declaration, he avers that, solely because of the injuries received by his said wife as aforesaid, he has continually, since said accident up to the present

time, been deprived, and will for all future time during the life of his said wife be deprived, of the comfort, fellowship, society, aid, and assistance of his said wife in his domestic affairs, which he, said plaintiff, during all that time ought to have had, and ought to have, and otherwise might have had and should have.

²⁷⁹ The wife testified upon the trial that, after the street-car had stopped, she attempted to alight, when the car started suddenly, throwing her to the ground, and that the hook of the chain used to cut off access to the car, and which hung from the dashboard, caught in her clothing and she was dragged some distance. The fact that the hook caught in her clothing, and that she was dragged some distance, was not disputed. There was, however, testimony tending to show that the car was not started until she had alighted, and that the hook caught in her clothing after she had reached the ground. The wife was the only witness who testified to the sudden starting of the car while she was in the act of alighting. Her physicians testified that a miscarriage followed the injury, and that she was deranged at times during her illness; and one of plaintiff's witnesses who had testified that he had several times, within a few months after the accident, examined her with reference to her mental condition, and had found her deranged, on cross-examination testified as follows:

"Q. Did you see her on the stand this morning? A. I saw her about three minutes.

"Q. Did you think that she was insane this morning? A. I did, most certainly.

"Q. You would not believe her testimony? A. I would not."

Complaint is made of that portion of the charge to the jury wherein the court said: "You are at liberty to consider the permanent character of this injury or its lack of permanency. I allowed this testimony to be introduced as to the mental condition of this woman for the purpose of showing you, or allowing you to judge, as to how long her husband might be deprived of her society, or of her labor as a wife, in the discharge of her domestic duties in the household, and for no other purpose. You are at liberty to investigate all the proof in this case that has been offered to you as to whether ²⁸⁰ this woman is sane or insane. I charge you that, if you shall find that now this woman is without sufficient mental capacity to understand what is going on, you are not at liberty then to consider her testimony in this case at all, for you are only at liberty to consider the testimony of a person who is *compos mentis*, or of sound mind; for a person who is

without sound mind, capable of remembering or giving testimony in a case, is not to be allowed in a court of justice. One of the physicians here testified that she was insane now. If you shall come to that conclusion, then you are not at liberty to regard her testimony at all in this controversy."

This was error. We held in *Mead v. Harris*, 101 Mich. 585, that the question of the competency of a witness is one for the court, and also that, if a witness who is mentally weak can give lucid, connected testimony, the question of the weight of such evidence is for the jury, under proper instructions. The witness in the present case was examined at length, and told when she boarded the car, who accompanied her, how she notified the conductor where she wanted to get off, and gave a lucid and connected story. Indeed, she is corroborated in her story throughout, except as to the sudden starting of the car before she had reached the ground. The rule laid down in *Mead v. Harris*, 101 Mich. 585, is sustained by a conclusive array of authority: *Taylor on Evidence*, 8th Eng. ed., secs. 23, 1375; 1 *Rice on Evidence*, 532; *Coleman v. Commonwealth*, 25 Gratt. 865; 18 Am. Rep. 711; *District of Columbia v. Armes*, 107 U. S. 519. Mr. Wharton says: "It is now settled that in all cases either lunatic or idiot may be received, if, in the discretion of the court, he appears to have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct answer to the questions put. The question of competency is to be determined by the judge trying the case, upon the examination of the witness himself, or upon the testimony of third persons": 1 *Wharton's Criminal Law*, 5th ed., sec. 752, cited in *Coleman v. Commonwealth*, 25 Gratt. 865; 18 Am. Rep. 711. See, also, 1 *Wharton and Stille's Medical Jurisprudence*, sec. 242.

The subject is ably discussed, in the last case cited, by 281 Mr. Justice Field, who cites an English case (*Regina v. Hill*, 5 Cox C. C. 259), where a patient in a lunatic asylum was held a competent witness.

In *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502, the inadmissibility of the testimony was predicated upon professional relationship. The fact of the relationship was disputed. The trial court excluded some matters and received others. This court held that while, on an intricate question of fact, the jury might properly be consulted, there was room for the claim that all of the intercourse was not confidential, and that too large a range of exclusion was left for the jury. In the present case, the question was not an intricate one. The rule is, that the per-

son affected with insanity is admissible as a witness if he have sufficient understanding to comprehend the obligation of an oath, and be capable of giving a lucid account of such matters as are in dispute. This question is to be determined in the main upon an examination of the witness when produced.

The court was, we think, right in limiting the recovery to the value of such services as the wife would be likely to have rendered in the discharge of her domestic duties. The declaration covered such services only.

The court erred in instructing the jury that: "The jury must take into consideration the domestic relations of the plaintiff and his wife, and the fact that he is not able to support her, and that he does not live with her. The reason assigned, that he does not live with her, is that he cannot support her; and that is all the evidence on that subject that I know of. She said that, if he could support her, she would live with him; but they had not lived together for a certain time."

There was some testimony tending to show that, for a short time after the marriage of plaintiff and his wife, he was in Colorado, but there was nothing to show that this separation was because of any domestic infelicity. It seems ²⁸² that after the injury the wife was taken to her mother's. On cross-examination she says: "Q. After the injury you stayed and lived with your mother. How long was he away from you after the injury—after this accident? A. I don't know, I am sure. I guess he came to see me when I was sick. I can't say.

"Q. Are you living together now? A. If he could support me; but he is sick, and not able to support me.

"Q. So you are not living in the same house? A. No, sir; he was away trying to get work. There is no work in Detroit for him, and he cannot get it to do.

"Q. This was in 1891. Have you lived with him at all since that time in the same house? A. He came up to my house—my mother's house—when I was sick, so they tell me.

"Q. But as a matter of fact, you have not lived together in the same house since 1891? A. I believe not; not since they took me from him to their home. He came there. That was his home as well as mine. We boarded there."

If, because of the injury, the plaintiff was not able to support his wife in her then condition, the fact would not defeat recovery for loss of her services. If he was sick and unable to support her, and she had been well and assisted in his care and support, that fact certainly would not take away the right to recover.

Their separation, so far as this record shows, was not the result of domestic troubles, nor was it an abandonment.

The court gave the following instruction: "If the jury believe that the hook was in the proper place when the car left the city hall, and that it was displaced either by Mrs. Bowdle or by some other passenger, and by hanging caught Mrs. Bowdle's dress, then the plaintiff cannot recover, and your verdict must be for the defendant; that is, if this was done without any negligence on the part of the street railway company, or any contributory negligence on the part of Mrs. Bowdle."

This instruction, and other portions of the charge, ²⁸³ practically took from the jury the question of the negligent starting of the car before the injured party had alighted, and the error is not cured by other portions of the charge.

The judgment should be reversed, and a new trial ordered.

WITNESSES—COMPETENCY—QUESTION FOR COURT.—The competency of a person, offered as a witness, to testify must be decided by the trial court, then and there, and its ruling is not subject to review nor disturbance on appeal, unless a clear abuse of discretion is shown: *Dickson v. Waldron*, 135 Ind. 507; 41 Am. St. Rep. 440.

WITNESSES—LUNATICS—COMPETENCY.—The fact that a person is a lunatic does not, per se, exclude him as a witness, but he is competent if, at the time of his examination, he has that share of understanding which is necessary to enable him to retain in memory the events of which he has been a witness, and to give him a knowledge of right and wrong, and of such competency the court is the judge: *Coleman v. Commonwealth*, 25 Gratt. 865; 18 Am. Rep. 711. See, also, the note to *Alleman v. Stepp*, 35 Am. Rep. 291.

HUSBAND AND WIFE—INJURY TO WIFE—MEASURE OF DAMAGES.—In an action by a husband and wife, jointly, to recover for an injury to her caused by the negligence of a third person, the measure of damages is compensation for the injury and its subsequent consequences, her pain, suffering, and wounded feelings, the cost of her nursing, medical attendance, and medicines, and the value of her loss of services in the household: *Hawkins v. Front Street etc. Ry. Co.*, 8 Wash. 592; 28 Am. St. Rep. 72, and note. A husband cannot recover damages for his anxiety and sympathy for the suffering of his wife, in an action to recover for personal injuries to her: *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772.

BIRKETT v. WESTERN UNION TELEGRAPH COMPANY.

[103 MICHIGAN, 361.]

TELEGRAPH COMPANIES ARE NOT COMMON CARRIERS, in the absence of a statute making them such. They may stipulate for limitation of their liability for errors arising from any cause except willful misconduct or gross negligence.

TELEGRAPH COMPANIES—REGULATIONS LIMITING LIABILITY.—A regulation by a telegraph company limiting its liability for mistakes or delays in the transmission or delivery, or for the nondelivery, of any unrepeatd message, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the message, is reasonable and valid.

TELEGRAPH COMPANIES—EFFECT OF REGULATIONS UPON BLANKS.—The sender of a telegraphic message, written upon a blank supplied by the company, and signed by the sender, is bound by reasonable regulations printed thereon, whether he has actual knowledge thereof or not, and cannot recover for delay in the transmission of the message, in the absence of gross negligence or willful misconduct on the part of the company or its servants.

TELEGRAPH COMPANIES—DELAY IN TRANSMISSION—GROSS NEGLIGENCE.—If a telegraph company has provided suitable instruments and competent operators, the failure of an operator to make proper connections, thus causing delay in the transmission of a message, is not gross negligence for which the company is liable, when it has stipulated for nonliability for delays in the transmission of messages.

C. A. Kent, for the appellant.

D. W. Brooks and O. Kirchner, for the appellee.

³⁶² GRANT, J. Defendant has a telegraph office at Hand station, on the Wabash railroad, twelve miles from Detroit, and also at Dearborn, on the Michigan Central. The distance between them is between three and four miles. At both places the office is one with that of the railway company, and the operators are those employed by these companies. Defendant has an arrangement with the companies, by which their operators at these stations do all its business. It has no contract with the operators, and no control over them. The entire receipts of the defendant at Hand are about two dollars and fifty cents, and at Dearborn about four dollars, per month. The cost of a telegraph operator at either place would be about forty dollars.

Plaintiff resided at Hand station. His wife was taken sick on the morning of August 26, 1890, and a physician residing at Dearborn was summoned to attend her. She ³⁶³ was suffering from a miscarriage. The flow of blood was stopped, and the physician left, with instructions to send for him if the hemorrhage returned. About nine o'clock in the morning she became

worse. At ten o'clock plaintiff sent an unrepeatd message to the physician at Dearborn, saying, "Come to my house quick." He also informed the operator of Mrs. Birkett's illness, and of the necessity of haste. The message had to go by way of Detroit. It reached the latter place in due time, but the operator at Detroit could not get the operator at Dearborn, although he tried many times. The message should have been delivered in about half an hour, but was not delivered until about two o'clock P. M. The regular operator at Dearborn had been granted leave of absence, and his place temporarily supplied by another, who did not make the proper connection with the Detroit office of the defendant. This was the reason of the delay in sending the message. It is claimed by plaintiff that the health of his wife was seriously injured by the delay in the delivery of the message, and the consequent failure to obtain medical attendance and treatment, and also that he had been subjected thereby to expense in procuring medical attendance and medicines. For the alleged injury he recovered verdict and judgment of two thousand five hundred dollars.

The telegraph blank upon which the message was sent, and signed by the plaintiff, stated that it was taken by the company subject to the terms thereon printed. One of these terms reads as follows: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition."

It further provided that the company should not be liable for mistakes or delays in the transmission or delivery or for the nondelivery of any unrepeatd message, whether ³⁶⁴ happening by negligence of its servants, or otherwise, beyond the amount received for sending the same. The first defense set up against this action is this condition, which defendant insists was a part of the contract between it and the plaintiff, and is such a reasonable condition as the law authorizes it to make.

It was settled in this state by the case of *Western Union Tel. Co. v. Carew*, 15 Mich. 525, that telegraph companies, in the absence of any provision of the statute, are not common carriers, and that the regulation stated above is reasonable, and binding upon the senders of messages, whether they had knowledge of its contents or not. This has been accepted as the law in this state for twenty-seven years. The telegram, as written, used the word "forty"; as delivered, the word "four." The legislature has not seen fit to change the liability of telegraph companies, as there

established; and, whatever might be the views of any of us if it were a new question, we are not disposed to overrule that case, which received the sanction of the three eminent jurists who decided it. The reasoning of that decision is substantially the same as that found in the decisions of many other courts, some of which are cited in the opinion. In addition to the cases there cited, we cite the following: *Ellis v. American Tel. Co.*, 13 Allen, 226; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69; *Clement v. Western Union Tel. Co.*, 137 Mass. 463; *Western Union Tel. Co. v. Hearne*, 77 Tex. 83; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; *Becker v. Western Union Tel. Co.*, 11 Neb. 87; 38 Am. Rep. 356; *Wann v. Western Union Tel. Co.*, 37 Mo. 472; 90 Am. Dec. 395; *Lassiter v. Western Union Tel. Co.*, 89 N. C. 334; *United States Tel. Co. v. Gildersleve*, 29 Md. 232; 96 Am. Dec. 519; *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 56 Am. Rep. 119.

In *Ellis v. American Tel. Co.*, 13 Allen, 226, the dispatch, as sent, read, "Ten (10) men, one hundred twenty-five dollars." As received, it read, "Ten (10) men, one hundred seventy-five ~~365~~ (175) dollars." In *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485, a material part of the message was omitted. In *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, the message was never delivered. In *Redpath v. Western Union Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69, the message was never delivered, but was sent to Oswego, instead of to Owego. In *Clement v. Western Union Tel. Co.*, 137 Mass. 463, the message was not delivered until five days after its receipt. In *Western Union Tel. Co. v. Hearne*, 77 Tex. 83, the dispatch read: "Return note left by Hearne. Draw for \$500." As delivered, it read: "Return note left by Hearne, order \$500." The plaintiff in the court below recovered a verdict for twenty-five thousand dollars. In *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238, the dispatch, as sent, read, "I hold the Tibbs tract for you." As received, it read, "I sold the Tibbs tract for you." In *Becker v. Western Union Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 356, the dispatch, as sent, read, "One fifty"; as received, "One sixty." In *Wann v. Western Union Tel. Co.*, 37 Mo. 472, 90 Am. Dec. 395, the dispatch, as sent, read, "Ship by sail"; as received, "Ship by rail." A similar mistake occurred in *Lassiter v. Western Union Tel. Co.*, 89 N. C. 334, which case has, however, been recently overruled by *Brown v. Postal Tel. Co.*, 111 N. C. 187; 32 Am. St. Rep. 798. In

United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519, the dispatch was never delivered. In MacAndrew v. Telegraph Co., 17 Com. B. 3, the message directed a vessel to proceed to Hull. The message, when delivered, read "Southampton." In the above cases, this regulation was held reasonable, and the failure to order the message repeated a complete answer to the action. Several of the authorities above cited recognize the rule that any condition relieving telegraph companies from liability for gross negligence, willful misconduct, or fraud is void, as against public policy. This rule is also recognized in the following authorities: White v. Western Union Tel. Co., 5 McCrary, 103; Western Union Tel. Co. v. Howell, 38 Kan. 685; Western Union Tel. Co. v. Goodbar (Miss.), 7 South. Rep. 214.

The authorities are not uniform, and several authorities will be found to the contrary. The rule is criticised in Thompson on the Law of Electricity, chapter 8, where ³⁶⁶ the authorities will be found collated. We do not deem it important to cite them here. Some of them recognize the right of telegraph companies to establish reasonable rules and regulations for the conduct of their business. Some also recognize these regulations as valid, but strip them of their force by holding that they do not apply to nor relieve a telegraph company in case of negligence. Speaking for myself, I can see no object in the regulation, unless it be to relieve the company from certain negligent acts of its employes. If they be not common carriers—and this is almost universally admitted—then there is no liability, except in case of negligence. If delay in delivery, or failure to deliver, or mistake in the wording of messages, is attributable to storm, to accident, to sudden sickness of an operator or a messenger, or to any cause which does not of itself imply negligence, there can be no liability. What purpose, then, is there in, or what benefit is, such a regulation, if it still leaves open the question of negligence against them, where the sender does not choose to comply with the conditions to which he has agreed, and which will, in all probability, insure the delivery of his message as written? In commenting upon this class of cases, which hold that telegraph companies cannot stipulate against any negligence on the part of their employes, the supreme court of California says:

"But, as this latter class of cases concede that telegraph companies are not common carriers, their liability must rest on the ground of negligence or willful misconduct, which is fraud. Fraudulent conduct on the part of the company would, of course, vitiate such a stipulation; but to say that no stipulation can be

made limiting their liability for negligence is to say, in effect, that no stipulation can be made limiting their liability at all. It seems to us, therefore, that we must either hold, as did the courts in Illinois, Maine, and Wisconsin, that such stipulations are invalid, because unsupported by a consideration and contrary to public policy, or that it is competent for ³⁶⁷ telegraph companies to stipulate for the limitation of their liability for errors arising from any cause except willful misconduct or gross negligence": *Hart v. Western Union Tel. Co.*, 66 Cal. 583; 56 Am. Rep. 119.

The court below and counsel appear to have recognized the rule as established in *Western Union Tel. Co. v. Carew*, 15 Mich. 525, for it was left to the jury to determine whether the defendant was guilty of gross negligence in the failure to deliver the message within the usual time. Such failure is certainly no more gross negligence than in the cases above cited, where the message was not delivered at all, and in others where the language was very materially changed and serious damage resulted. Negligence is the gist of these actions. It must be both alleged and proven. Some authorities hold that proof of the delivery of the message to the company by the sender, and of the failure to deliver, or of delay in delivery, or of its receipt, in language materially different from that in which it was sent, makes a *prima facie* case of negligence, and casts the burden of proof upon the company to explain. This may be the correct rule, since the facts are peculiarly within the knowledge of the company, but that question is not now involved, since the cause of the delay is conceded.

The highest judicial tribunal in this country, in the recent case of *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, has passed upon the precise question. The authorities are there cited and discussed in an exhaustive opinion by Mr. Justice Gray. *Western Union Tel. Co. v. Carew*, 15 Mich. 525, is cited, and its language quoted with approval. The regulation in that case is identical with the one in this, and it is sustained in its entirety. Mr. Justice Gray cites and discusses the decisions holding the regulation to be against public policy and void, among which is the case of *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38. He quotes the language of that decision, and says of it:

³⁶⁸ "The effect of that construction will be either to hold telegraph companies to be subject to the liability of common carriers, which the court admitted, in an earlier part of its opinion, that they were not, or else to allow to the stipulation no effect

whatever; for, if they were not common carriers, they would not, even if there were no express stipulation, be liable for unavoidable mistakes, due to causes over which they have no control. . . .

"The conclusion is irresistible that, if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence, and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message."

It is therefore clear that, in order to hold this regulation, which was a part of the contract, void, we must not only overrule the decision of our own court, but must run counter to the great weight of authority. We do not feel justified in doing this: See, also, *Riley v. Telegraph Co.*, 26 N. Y. Supp. 532; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181, quoting *Western Union Tel. Co. v. Carew*, 15 Mich. 525, with approval.

The statute of California requires telegraph companies to "use great care and diligence in the transmission and delivery of messages": Cal. Civ. Code, sec. 2162. The federal court in that state held that a company could not, by stipulation, relieve itself from the liability imposed by this express enactment": *Western Union Tel. Co. v. Cook*, 9 Co. Ct. App. 680; 61 Fed. Rep. 624.

In its decision, the court say: "The nature of the employment is so peculiar, the risks attending it so extraordinary, that it is not unreasonable to uphold such stipulations, to the extent of limiting the liability of the company for losses not occasioned by its want of care and diligence exacted by the law under which it operates."

³⁶⁹ It is further argued by the learned counsel for the plaintiff that the repetition of the message would not have prevented the damage complained of, and that, therefore, the failure to have it repeated does not protect the defendant from liability. In the monographic note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 468, the following authorities are cited as supporting this contention: *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Birney v. New York etc. Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Baldwin v. United States Tel. Co.*, 54 Barb. 505; *Sprague v. Western Union Tel. Co.*, 6 Daly, 200; *Bell v. Telegraph Co.*, 25 L. C. Jur. 248.

In *Western Union Tel. Co. v. Fenton*, 52 Ind. 1, the action was based entirely upon the statute of the state of Indiana, and not upon any contract between the parties. The court, in *Birney v. New York etc. Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607, based its holding entirely upon the fact that no effort whatever was made by the company or its agents to place the message upon its transit. The decision recognizes the validity of a regulation similar to that in the present case.

In *Baldwin v. United States Tel. Co.*, 54 Barb. 503, the defendant was a connecting line, and received the message from the United States Branch Telegraph Company, to whom the plaintiffs had given it for transmission. The defendant set up its agreement with the other company, to which the plaintiffs were not parties. The court say, at page 516: "It is not necessary to discuss what would have been the rights of the parties, had the plaintiffs sent the message from the defendant's office, written upon one of *their* blanks, containing *their rules, conditions, and regulations* as to their terms of transmitting messages." The italics are those of the decision.

Sprague v. Western Union Tel. Co., 6 Daly, 200, is another case of the same character. The court say, at page 203: ³⁷⁰ "This was not a mistake or delay in the transmission or delivery, or a nondelivery, but an entire breach, of the contract, by a neglect to send the message at all."

In *Bell v. Telegraph Co.*, 25 L. C. Jur. 248, plaintiff telegraphed to one Machar, to which Machar immediately sent an answer by the defendant's line, which was never delivered. Stress appears to be laid in the opinion upon the fact that plaintiff was to be the recipient of the message, and was not a party, therefore, to the conditions of the message sent. The liability, however, was chiefly placed upon the law of the Dominion in relation to common carriers, which is quoted in the opinion as follows: "Notice by carriers of special conditions limiting their liability is binding only upon persons to whom it is made known; and notwithstanding such notice, and the knowledge thereof, carriers are liable, wherever it is proved that the damage is caused by their fault, or the fault of those for whom they are responsible." The principles of this law are then briefly applied "to the case in hand," and the defendant held liable.

It is apparent, we think, that these decisions do not sustain the text of the learned editor, and throw no light upon the present controversy. In *Western Union Tel. Co. v. Graham*, 1 Col. 230, 9 Am. Rep. 136, it does not clearly appear where the mistake occurred. The statement in the opinion is, that "the message

was not transmitted and delivered." It may be inferred from this that the message was never placed in transit. While the language of this opinion sustains the text, it is significant that there was no stipulation, as in the case at bar, that the company should not be liable in the case of an unrepeatd message. The notice simply stated that messages of importance ought to be repeated, and attempted to limit the liability, in the case of repeated messages, to five hundred times the amount paid for sending them. In *Ellis v. American Tel. Co.*, 13 Allen, 226, the language upon this point was obiter dicta, and so ³⁷¹ held by the same court in subsequent decisions hereinafter cited.

This rule appears to be sanctioned in *Fleischner v. Pacific etc. Cable Co.*, 55 Fed. Rep. 738. The defendant in that case was clearly liable upon other grounds. It received an important message for transmission from Portland, Oregon, to Seattle. There was a competing line between these two points. The line of the defendant was down, and had been for more than an hour previous to the receipt of the message. The defendant did not know where it was down, nor how long it would require to put it in order. It did not notify the sender that its line was down, nor make any attempt to send the message by the competing line. This was clearly a case of gross negligence, for which it, under all the authorities, would have been liable.

In *Grinnell vs. Western Union Tel. Co.*, 113 Mass. 306, 18 Am. Rep. 485, the language of *Ellis v. American Tel. Co.*, 13 Allen, 226, upon this point was held to be obiter dicta, and was disapproved. The court in that case, replying to this contention, say: "The conclusive answer to it is that the plaintiff, having omitted to fulfill the condition on which alone, by the terms of the express contract between the parties, he could recover for any mistake in transmission more than the amount of his original payment, cannot be permitted to prove that his own failure to fulfill his contract did not affect the result."

The precise question was again before that court in *Clement v. Western Union Tel. Co.*, 137 Mass. 466, where the message had reached the receiving office, and been intrusted to a messenger boy for delivery. The language of the court is as follows: "The only negligence shown in this case was an unexplained delay in delivering the message on the part of the messenger boy, to whom it was, after its receipt, intrusted for delivery. It may be that the company might be guilty of some fraudulent or gross negligence in transmitting ³⁷² or delivering a message, so that it would not be protected by its regulation from liability for the actual damages, though in excess of the sum stipulated. But

the negligence of the messenger boys in delivering messages was plainly contemplated by the parties when they entered into the stipulation, and there are no principles of public policy which should prevent the company from stipulating that it will not be responsible for such negligence, beyond a fixed amount, unless it receives a reasonable compensation for assuming further responsibility." This case is cited with approval in *Primrose v. Western Union Tel. Co.*, 154 U. S. 1.

The question now before us is not one of neglect to transmit at all, nor of failure to deliver after receipt at the place of destination. It is a case of delay in transmission. It is obvious that such delays may occur from various causes. There is as much reason in stipulating against such delays as there is against inaccuracies in the message. The demand for its repetition is a notice of its importance and the necessity for promptness, additional to the language of the message itself. If the order to repeat had been contained in the message, we cannot say that the operator at Detroit, upon finding that he could not get the office at Dearborn, would not have at once telegraphed to the plaintiff that fact. However that may be, this delay was one against which he contracted, and against which, under the authorities above cited, the parties had the clear right to do so.

The defendant provided suitable instruments and competent operators. The failure of the temporary operator at Dearborn to connect his instrument with its line for a few hours is not "gross negligence," within the definition adopted by this court: *Denman v. Johnston*, 85 Mich. 387; *Frost v. Milwaukee etc. R. R. Co.*, 96 Mich. 470. There was no intentional wrong, and no act done to cause the delay, with knowledge of the plaintiff's message. It appears that about one message, every two days, came to Dearborn. ³⁷³ Defendant could not keep an operator there at its own expense. It was therefore entirely proper for it to employ the railroad operator to attend to its business at this and similar stations. But it cannot defend upon the ground that the business was small. Having held itself out as ready to do business at these stations, the duty imposed was the same as though it had an operator of its own. The act complained of, however, was not attended by any willful misconduct, or reckless disregard of the rights of plaintiff, and cannot, therefore, be held to constitute gross negligence.

The judgment must be reversed, and a new trial ordered.

The other justices concurred.

TELEGRAPH COMPANIES—WHETHER COMMON CARRIERS. Telegraph companies are common carriers of intelligence, with rights and duties analogous to those of public carriers of goods and passengers: *Western Union Tel. Co. v. Call Pub. Co.*, 44 Neb. 328; 48 Am. St. Rep. 729, and note.

TELEGRAPH COMPANIES—STIPULATION AGAINST LIABILITY.—A stipulation in the message blank of a telegraph company that its liability for any mistake or delay in the transmission or delivery of a message shall not extend beyond the sum received for sending it, unless the sender orders the message repeated, is a reasonable regulation, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated for any cause, except willful misconduct or gross negligence on its part: *Redington v. Pacific Postal Tel. etc. Co.*, 107 Cal. 317; 48 Am. St. Rep. 132, and note; but such a regulation is unreasonable and inapplicable when applied to a case in which the company has failed and neglected to transmit the message at all: *Francis v. Western Union Tel. Co.*, 58 Minn. 252; 49 Am. St. Rep. 507.

TELEGRAPH COMPANIES—BLANKS—BINDING EFFECT OF REGULATIONS ON.—Both the sender of a telegraphic message and the person to whom it is addressed are bound by reasonable regulations printed upon a blank furnished by the telegraph company, upon which the message is written and signed by the sender: *Stamey v. Western Union Tel. Co.*, 92 Ga. 613; 44 Am. St. Rep. 95, and note; but see *Mathis v. Western Union Tel. Co.*, 94 Ga. 338; 47 Am. St. Rep. 167.

PEOPLE v. KETCHUM.

[103 MICHIGAN, 442.]

OBSCENE PICTURES.—A negative from which an obscene picture may be made is a picture, and sitting for such negative is procuring it.

OBSCENE PICTURES—INTENT.—Evidence that the person informed against sat for a negative from which an obscene photograph was produced, without more, is not sufficient to justify a conviction, under a statute making it an offense to procure any obscene picture for the purpose of sale, exhibition, loan, or circulation.

W. A. Fraser and J. E. Nichols, for the appellant.

A. A. Ellis, attorney general, and L. B. Gardner, prosecuting attorney, for the people.

444 **HOOKE**, J. Defendant was convicted under an information which charged her with having procured a certain obscene picture of herself, for the purpose of exhibition, loan, and circulation. Counsel for the people claim that the evidence shows that the defendant employed two itinerant photographers to make negatives of her residence; that subsequently these negatives were found among the effects of said photographers, and that Exhibit A was also found at the same time and place. Exhibit A was a negative of a woman in a practically nude condi-

tion, and is claimed to be a negative of the person of the defendant. Exhibit B was a photograph made from this negative by direction of the prosecuting attorney or sheriff. A witness named Cole testified that he saw a picture identically like Exhibit B in Mohr's cigar store. There was no evidence that any photograph was made from the negative, except that made by the officer's direction, unless the picture described by Cole was such. There was testimony tending to show that the photographers did some work upon nude fancy pictures for Mohr's saloon. The court instructed the jury, in substance, that the negative is a picture, ⁴⁴⁵ within the meaning of the law; that, if the defendant voluntarily sat in a nude condition, to enable it to be taken, she assisted in obtaining it, and therefore procured it; and that an intention to circulate photographic prints from the negative would be an intention to circulate the picture, within the statute. He left the question of the intent with which it was procured to the jury.

We have no doubt that a negative is a picture. We think, also, that the court was right in holding that sitting for the negative was procuring the negative.

The purpose for which the picture was obtained is an essential element of the offense, and must be proved like any other element. There can be no presumption of a particular purpose; it must be a legitimate inference from the evidence. The facts that Wigle & Webb had the negative, and that Cole saw a picture printed from it, do not sufficiently prove it. The natural inference from these facts would be, that she sat for a negative to obtain a picture or pictures for herself. While it may be admitted that the usual purpose of procuring photographs is exhibition to friends, it does not necessarily follow that such is the purpose. Nor is there any reason for thinking that she designed that Wigle & Webb should dispose of any to other persons. The purpose does not appear, unless from the fact that one was seen, or from the assumption that she expected or designed to give prints to her friends. There is nothing to show either. If there were testimony tending to show that she did exhibit or circulate the picture, we might legitimately infer that she intended, when she procured it, to make such use of it. But in this case, she is not shown to have done more than to sit for a negative, and that only appears from the fact that the negative was found in the possession of the photographers, with whom she had done business in relation ⁴⁴⁶ to other pictures. Upon this record, the court should have directed a verdict of not guilty.

Conviction set aside, and a new trial ordered.

The other justices concurred.

INDECENY—OBSCENE PICTURES.—The exhibition of an obscene picture is an offense tending to the corruption of morals, and is indictable at common law: *Commonwealth v. Sharpless*, 2 Serg. & R. 91; 7 Am. Dec. 632.

FIRST COMMERCIAL BANK v. TALBERT.

[108 MICHIGAN, 626.]

GUARANTY, CONTINUING — INDORSEMENTS — RENEWALS.—If a member of an insolvent banking firm sends to the cashier of another bank, holding a large amount of commercial paper indorsed by such firm, a writing authorizing his copartner to use the name of the writer, "as one of the firm, as indorsers on paper" sent to such cashier to renew the indorsed paper, such writing authorizes the continuance of the use of the firm name as indorser, and is not confined to renewals of the particular paper held by the bank at the time it was given, but invests the copartner to whom it was given with power to continue such renewals until the paper can be retired by collection.

GUARANTY, CONTINUING — REORGANIZATION OF BANK.—A national bank which is the reorganization of a state bank, with the same assets, liabilities, officers, and stockholders, retains its identity, so that a guaranty of payment made to the state bank can be enforced by the reorganized bank.

Weadock & Purcell and A. C. Baldwin, for the appellant.

Humphrey & Grant, for the appellee.

626 MONTGOMERY, J. In 1884, Leroy Moore & Co., composed of Leroy Moore and defendant, James Talbert, were engaged in the banking business at Greenville, Michigan, and in June of that year closed their doors. At this time, the First National Bank of Pontiac held about fifty thousand dollars of commercial paper with the indorsement of Leroy Moore & Co. Mr. John D. Norton, cashier of the First National Bank, had an interview with the defendant, Talbert, in which Mr. Norton stated to the defendant that the bank held this amount of paper, and should, for its protection, have some writing to hold the defendant, Talbert, on renewals. Subsequently, an authority in writing was sent to the bank in the following terms:

627 "Greenville, Mich., Sept. 15, 1884.

"John D. Norton, Cashier.

"Dear Sir: I hereby authorize Leroy Moore to use my name

as one of the firm of Leroy Moore & Co. as indorsers on paper sent you for renewals.

“Very respectfully,

“JAMES TALBERT.”

Among the paper held by the bank at the time of the suspension of Leroy Moore & Co. were notes amounting to upwards of five thousand dollars, signed by C. S. D. Harroun. The paper of Harroun was renewed from time to time, and reduced until the note in suit represents the unpaid portion of his paper. The present note was taken by the plaintiff, the First Commercial Bank. The First National Bank continued business until January 1, 1893, when the First Commercial Bank was organized under the state banking law, and the testimony tends to show that the only change was a reorganization, the First Commercial taking all the paper of the First National, and assuming all its liabilities, and having the same stockholders and the same officers and board of directors.

Three contentions were made by the defendant on the trial: 1. That the authority relied upon was not an authority to indorse the firm name of Leroy Moore & Co., but the name of James Talbert; 2. That the authority was to indorse paper held by the First National Bank only, and not paper held by the First Commercial Bank; 3. That the authority cannot be held to authorize repeated renewals, but must be limited to renewals of paper held by the bank on September 15, 1884, or, at the most, that defendant could not be held by renewals after such original paper would have outlawed. The circuit judge directed a verdict for the defendant, and plaintiff appeals.

1. We do not think the authorization open to the construction contended for by the defendant. It is suggested ⁶²⁸ that, the authority being “to use my name,” it should be construed as authorizing Moore to sign the individual name of Talbert, and not the firm name. But we think it clear that the intent was to authorize the continuance of the use of the firm name. In no other way would the name of Talbert be signed as a member of the firm of Leroy Moore & Co.

2. Defendant also insists that, the authority being directed to John B. Norton as cashier of the First National Bank, the plaintiff could not act upon it, and charge the defendant; and cases are cited in which the guaranty of payment of obligations, to be in the future incurred, to a particular firm has been held not to bind the guarantor to meet obligations incurred by purchases made of another or different firm, even though the firm be the successor to the firm addressed. The case of *Crane Co. v.*

Specht, 39 Neb. 123, 42 Am. St. Rep. 562, is a case of this character. There is much force in the contention of plaintiff, that the authorization in question is something more than a guaranty of payment, and is in the nature of a continuation of the partner's authority to bind the banking firm of Leroy Moore & Co. by indorsement, and that the instrument should not be construed with the same strictness as an ordinary guaranty, but more as in the nature of a continuation of the copartnership for the purpose of dealing with the paper then held by the bank. But, however this may be, we think that the First Commercial Bank is substantially identical with the First National. The state banking law (3 Howell's Statutes, sec. 3208 b6) authorizes the reorganization of a national bank as a state bank. It provides: "Thereupon all assets, real and personal, of said dissolved national bank shall, by act of law, be vested in and become the property of such state bank, subject to all liabilities of said national bank not liquidated under the laws of the United States before such reorganization."

629 It was evidently under this statute that the reorganization was effected, as the testimony is, that the First Commercial took all the paper of the First National, and assumed all the liabilities, and had the same board of directors and stockholders at the time of it. In the well-considered case of City Nat. Bank v. Phelps, 97 N. Y. 44, 49 Am. Rep. 513, a question which we think is precisely analogous to the one here under consideration was considered. The court held that a national bank, which was a reorganization of a former state bank, retained its identity, so that a guaranty of payment made to the state bank could be enforced by the reorganized national bank. It was said: "All property and rights which they held before organizing as national banks are continued to be vested in them under their new status. Great inconveniences might result if this saving of their existing assets did not include pending executory contracts and pending guaranties, as well as vested rights of property. Although, in form, their property and rights as state banks purport to be transferred to them in their new status as national banks, yet, in substance, there is no actual transfer from one body to another, but a continuation of the same body under a changed jurisdiction. As between it and those who have contracted with it, it retains its identity, notwithstanding its acceptance of the privilege of organizing under the national banking act."

3. Nor do we think that the authorization should be construed as limiting the authority to one to make the renewals of the particular notes then held by the bank. The statement should be

construed with reference to the known situation of the parties, and the evident purpose with which it was executed, which very plainly was to invest Moore with a discretion to continue these renewals until the paper could be retired by collection.

The judgment will be reversed, and a new trial ordered.

The other justices concurred.

GUARANTY—CONTINUING.—A written guaranty for the prompt payment of the price of goods purchased, or to be thereafter purchased, to the amount of a sum named, is a collateral, continuing guaranty, and the amount stated is a limitation upon the liability of the guarantor, and not upon the credit to be extended to the principal debtor: *Taussig v. Reid*, 145 Ill. 488; 36 Am. St. Rep. 504, and note. The subject of continuing guaranties is fully discussed in the notes to the following cases: *Columbus Sewer-Pipe Co. v. Ganser*, 55 Am. Rep. 701-703; *Gard v. Stevens*, 86 Am. Dec. 53; *Menard v. Scudder*, 56 Am. Dec. 618, and *Fellows v. Prentiss*, 45 Am. Dec. 492.

BANKS—NATIONAL, CHANGED FROM STATE.—A national bank, changed from a state bank, may maintain an action on a continuing guaranty for loans held by it before the change for loans both before and after the change: *City Nat. Bank v. Phelps*, 97 N. Y. 44; 49 Am. Rep. 513.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

STATE v. GAY.

[59 MINNESOTA, 6.]

AN ELECTION LAW SHOULD NOT BE CONSTRUED so radically as to render it incapable of enforcement without disfranchising great numbers of electors through no fault of theirs.

ELECTION LAWS, WHEN DIRECTORY.—A provision in a statute, that two judges of election, of opposite political parties, shall place their initials on the backs of all ballots before they are used by the voters, is not mandatory, and a failure to observe this provision, and the consequent marking of the ballots by judges who are of the same party, does not require the rejection of such ballots, when cast in good faith.

ELECTION OATH, FORM OF, FOR ILLITERATE VOTERS. If, after a voter has explained that he cannot read English, or cannot see because he has left his spectacles at home, he is sworn, and thereafter the judge says to him, "You swear now to this, that what you have told me is true," this is a sufficient making oath by the voter to reasons why he cannot mark his ballot for himself, and must have the aid of a judge of election or some other qualified elector.

AN OATH INCLUDES EVERY FORM OF ATTESTATION by which the party signifies that he is bound in conscience to perform an act faithfully and truthfully.

ELECTION LAWS—MANDATORY PROVISIONS.—That part of the statute requiring the administration of an oath to such voters as claim the right to have their ballots marked by another, is mandatory.

ELECTION LAWS.—THE FACT THAT THE SAME PERSON HAS MARKED THE BALLOTS of more than three voters does not require the rejection of such ballots, if it does not appear that any of the voters knew that the ballot cast by him had been marked by a person who had marked three other ballots, nor that anyone intended any fraud. Nor will the court infer such knowledge on

the part of the voters, because the room was small, and the location of the table on which the marking was done was such that some of the voters must have known what was being done.

ELECTION LAWS—RIGHT TO HAVE BALLOTS MARKED. The fact that an elector left his spectacles at home, and could not see without them, does not entitle him to have his ballot marked for him by a third person.

ELECTIONS.—THAT THE MARKING OF A BALLOT FOR AN ILLITERATE PERSON was done at a table at which the judges and clerks sat, and in the presence of other electors, who were passing in and out of the booth, and who might have heard how the voter intended to vote, does not warrant the exclusion of the ballots marked under such circumstances, where there was no design to destroy the secrecy of the ballot.

Election contest. Braley and Gay were candidates for the office of sheriff, and, according to the return of the canvassing board, the latter received a majority of the votes cast, and a certificate of election was consequently issued to him, and he qualified and entered upon the discharge of the duties of that office. Afterward, the attorney general of the state commenced an action, joining Braley as plaintiff, and alleging certain irregularities and defects in the manner of conducting the election, and asking that Gay be excluded from the office and Braley installed therein. The issues presented in the contest were tried before two judges of the court, who made findings and directed judgment to be entered in favor of the defendant. According to these findings, in one precinct Gay received three hundred and five votes, Braley one hundred, and others seven votes. Not more than thirty of the ballots cast in this precinct were indorsed with the initials of the judges of opposite political parties. No objection was made at the time to the fact that ballots were indorsed by judges both of whom belonged to the same political party. One of the judges in a precinct marked at least one hundred and fifty ballots for electors who could not read English, or had not brought their spectacles, of which ballots not less than one hundred and twenty-five were cast for Gay. Each of the electors for whom ballots were marked, after first being handed a ballot, said that he could not mark upon it the name of the candidate he desired to vote for, because he could not read English, or had not brought his glasses, and could not see without them. He was then required to take off his hat and raise his hand, when one of the judges said to him, "You swear now to this, that what you have told me is true." No other oath was administered to him, but the officers of election, accepting this oath as sufficient, marked the ballot for the voter as he desired. This marking took place in the presence of all the judges and clerks of election, and there

were other persons there present. The findings, however, exonerated the officers of election and the electors participating thereat from any fraudulent purpose or intent whatsoever or desire to destroy the secrecy of the ballot. The decision having been against the complainant, he appealed.

H. W. Childs, attorney general, M. B. Webber, and O. B. Gould, for the appellants.

L. L. Brown and Edward Lees, for the respondent.

¹⁹ COLLINS, J. By this proceeding the relator, Braley, questions the right of defendant, Gay, to the office of sheriff of Winona county. The election under which the latter now holds the office is that of 1892, and consequently the election law involved is the laws of 1891, chapter 4. We readily agree with counsel in the assertion that it was the purpose of the legislature, when enacting this law, to purge our methods of conducting elections of some of the evils connected therewith, and to promote the purity of the ballot; but the law must not be construed so radically as to render it incapable of enforcement without disfranchising great numbers of electors through no fault of their own, nor must the construction placed upon it be so technical as to lead to its overthrow. The construction must be practical, if this be possible, in view of the language used.

1. At one of the precincts in the city of Winona, two of the judges of election were of the same political party, while the third was of another party. Chapter 4, section 51, of the laws of 1891, requires that two of the judges, "of opposite political parties," shall place their initials on the backs of all the ballots before they are used by the voters. No subsequent reference is made in the law to this requirement, that the judges who thus mark the ballots shall be of opposite political faith; but, by later sections (52 and 56), it is enacted that the ballot, when presented to the voter, shall have the proper initials to be exposed to the judges when, after marking, it shall be offered for deposit in the box, and "no ballot which has not the initials of two judges of election in said judges' own handwriting on the back thereof" shall be placed in the box. About thirty of the ballots cast at this precinct, out of a total of four hundred and twelve, were marked by two of the ²⁰ judges of election in accordance with the provisions of said section 51; but the balance bore the initials of two judges who happened to be of the same political persuasion; and, if these ballots can be cast out of the count, relator is entitled to the office. His counsel claim that the provision of

the law which requires the two judges who place their initials upon the backs of the ballots to be of opposite political parties is mandatory, and that, unless strictly complied with, the ballots should not be counted. We cannot adopt this view. It is not claimed that there was any willful disregard of this provision of the law, or that, by failing to observe it, a fraud was perpetrated upon anyone, or that a wrong was intended or accomplished. The placing of initials on the ballots by judges who belonged to the same party was in ignorance of the requirement in question. There are many reasons why this provision must be held simply directory, but we need not state all. One is, that if this is a positive requirement, the entire vote of a precinct could be rejected by deception on the part of a person seeking the position of judge of election as to his politics, or by a mistake on the part of the appointing power as to the political affiliations of a person placed by it on the board, and in many other ways. Again, what would be the result if no persons could be found to serve as judges of election, except those of the same political party? With the construction contended for, the minority party in any precinct could disfranchise every voter in it, and the fewer in numbers of such party, the easier total disfranchisement could be accomplished. Again, we think the omission in section 56 of all reference to political affiliations is significant, if not controlling. When providing that ballots shall not be deposited in the box not bearing the initials of two judges, nothing is said as to the necessity of such initials being those of the judges of opposite political parties.

2. By section 57 it is required that whenever an elector shall make oath that, for specified reasons, he cannot mark his ballot, he may have the aid of a judge of election or qualified elector, who may read it to and mark it for him. The court below found that at the election in question, and at the precinct before mentioned, one of the judges of election marked at least one hundred and fifty ballots for alleged illiterate and physically disabled voters, of which at least one hundred and twenty-five⁸¹ were cast and counted for the defendant. This was done in good faith, in the presence of the other judges, of the clerks of election, and of some other electors. These ballots were all marked as requested by the voters whose requests were being complied with. Previous to marking, the voter who desired aid in the preparation of his ballot was asked by one of the judges the reason, and "if he replied that he could not read English, or had left his glasses at home," he was required to raise his right hand,

whereupon the judge said to him these words: "You swear now to this, that what you have told me is true."

The statutes nowhere prescribe the form of the oath to be administered to alleged illiterate or physically disabled voters, while the only general provision in respect to oaths is that found in the General Statutes of 1878, chapter 72, section 7. By this section it is enacted that the usual mode of administering oaths "now practiced in this state," with the ceremony of holding up the right hand, shall be observed. An oath, in its broadest sense, includes any form of attestation by which a party signifies that he is bound in conscience to perform an act faithfully and truthfully: 2 Bouvier's Law Dictionary, 320.

While the form used at the election was not as formal and exact as it might have been, we are of the opinion that it was of binding force and effect upon the conscience of persons to whom it was administered. It was sufficient upon which to base the charge of perjury: See *State v. Madigan*, 57 Minn. 425. We also wish to say in this connection that the provision of the law requiring the administration of an oath to such voters as claim the right to have their ballots marked by another person is mandatory, and must be strictly observed. An oath binding in form must be administered.

3. As before stated, the court below found that one of the judges of election marked, at the request of electors, one hundred and fifty of the ballots. It is urged by counsel for relator that the language used in said section 57, that no one person shall so mark the ballots of more than three electors, is mandatory, and hence that one hundred and forty-seven of these ballots were illegally cast, and must be excluded from the count. We are of the opinion that, in the absence of a finding that a single one of the voters whose ballots were marked by the same judge, subsequent to the first three, had knowledge of the fact that he had previously performed ²² the same service for three or more electors, the language cannot be held mandatory. Had there been a finding that this disregard of the terms of section 57 was with the knowledge and consent of the illiterate or physically disabled electors, we are quite clear that as to all who participated in this violation of the provision of the law, we should be obliged to hold it mandatory. Of course, we are now speaking, when holding that the words are simply directory, of a case where all—markers as well as electors—have acted in good faith. It is true that from the findings as to the size of the room in which the election was held, the location of the table on which the marking

was done, and the position of the electors as they came forward to vote, it might be inferred that some of them must have known what was being done. But we cannot act on mere inference, and declare that they did. In this connection, we wish to say that, in order to have a ballot marked by another person, the alleged illiterate or physically disabled elector must bring himself within the meaning of those terms. The fact that he is obliged to wear glasses, and has left them at home, as was the case with some of those for whom ballots were marked, is not sufficient. If the court below had found how many of these there were whose ballots were received, or the number thereof voting for defendant, we should feel constrained to deduct that number from defendant's plurality. But it failed so to do.

4. It has been said that this marking was done upon the table around which sat the judges and clerks, and in the presence of other electors, who were passing in and out of the voting booths in the rear of the room, and of others who were waiting an opportunity to cast their ballots. It is urged that because of this irregularity, whereby the absolute secrecy of the ballot was removed, all of the ballots marked so publicly should be rejected. A fair interpretation of the law requires the preservation, as far as possible, of secrecy as to the manner in which an elector votes. But impossibilities cannot be required. It is a commendable provision which authorizes the judges of election to mark the ballots of such voters as are unable, within the terms of the law, to mark their own, and yet if the judges do this, it cannot be done privately. A judge would not be permitted to seclude himself with the elector, either by clearing the room or by withdrawing from it. Nor could the voter's wishes be ²³ communicated, ordinarily, in so low a tone of voice as to prevent others from learning how he intended to vote. To demand anything approaching absolute secrecy in such cases would be wholly impracticable. We desire to protect the constitutional secrecy of the ballot fully, but it is impossible to insist upon the secrecy contended for by counsel for relator, where the right of suffrage is conferred upon the illiterate and physically disabled, as in this state, and is to be exercised in accordance with what is known as the "Australian system." While it is evident that others had the opportunity, if so disposed, to hear what was said by many of the electors to the judge as to the way in which they wished to have their ballots marked, it appears to us that there was a total absence of a design that they should be heard. Undoubtedly, intimidation was not tolerated, and the views and preferences of

the voters were fairly expressed by their ballots. The irregularity is insufficient to warrant us in excluding these ballots.

5. What we have said covers all of the assignments of error which need special consideration. We are satisfied that the relator has not established the allegations of his complaint, and, as a result, the judgment stands affirmed.

ELECTION LAWS—CONSTRUCTION OF.—Statutes tending to limit a citizen in the exercise of the right to vote should be liberally construed in his favor: *Bowers v. Smith*, 111 Mo. 45; 33 Am. St. Rep. 491, and note; and exceptions which exclude a ballot should be restricted rather than extended, so as to admit the ballot, if the spirit and intention of the law is not violated, although a liberal construction would violate it: *State v. Saxon*, 30 Fla. 668; 32 Am. St. Rep. 46, and note.

ELECTIONS—STATUTES—MANDATORY AND DIRECTORY PROVISIONS.—When a statute, expressly or by fair implication, declares any act to be essential to a valid election, or that an act shall be performed in a given manner, and no other, such provisions are mandatory, but if the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election: *State v. Russell*, 34 Neb. 116; 33 Am. St. Rep. 625, and note.

YORKS v. TOZER.

[50 MINNESOTA, 78.]

PARTNERSHIP.—EACH PARTNER SHOULD CONSULT THE OTHER in every important contingency, and if, because of his failure to do so, a loss is suffered, he must bear the whole of it; so held where a partner, believing the title to real property to be defective, purchased and paid for a conveyance, when inquiry of his partner would have revealed that the title was perfect.

Clapp & McCartney, for the appellant.

Henry N. Setzer, for the respondent.

●● CANTY, J. It is conceded by both parties, and found by the court, that the plaintiff and defendant were partners in the purchase of a tract of land; that it was agreed by and between them that the title should be taken in the name of defendant; that he should advance the purchase price, and pay the taxes, and plaintiff should sell the land, and, after repaying defendant the money so advanced by him and seven per cent interest thereon, the balance of the proceeds of such sale should be divided equally between them. The land was so purchased April 23, 1883, for \$450, and the title so taken. The land was sold and

conveyed by defendant August 6, 1890, for \$1,560. Said purchase money and the taxes paid by defendant, and interest on all of the same up to the time of said sale, amount to \$807.32, leaving \$752.68, the balance of the proceeds of said sale, so to be divided between them.

This action is brought for an accounting and a recovery of the sum due plaintiff under said agreement, and the trial court awarded plaintiff one-half of said balance of \$752.68, and from the judgment entered thereon defendant appeals. There is no settled case, and the error assigned is, that the judgment is not sustained by the findings of fact.

The court further finds that in July, 1890, without the knowledge of plaintiff, defendant negotiated a sale of said land to said purchaser; that the purchaser procured an abstract of title to said real estate from the register of deeds; that said abstract was in fact false, as it omitted one recorded conveyance, a link in the chain of title, and by such abstract it appeared that the original patentee was still the owner in fee of the land, whereas, in fact, defendant had a good title of record; that the purchaser submitted the abstract to two different and competent attorneys, who each advised him that, according to the abstract, the defendant had no title, ^{§1} and defendant was informed by such purchaser of the opinion of said attorneys. Defendant, believing he had no title, at an expense of \$526, then procured a conveyance to himself from said original patentee, and claims that this expense should be allowed him in said accounting as a part of the cost of the land to be deducted from such proceeds of said sale, and that plaintiff is entitled to only one-half of the balance of such proceeds, after this \$526 is also deducted therefrom.

It is further found by the court that defendant did not inform plaintiff of any of said negotiations, or of the apparent defect in said title, or show him or inform him of said abstract, or consult him as to purchasing the supposed title of said patentee, and that plaintiff had no knowledge or notice of any of these things, or of the sale of said property to said purchaser from defendant, until after the deed thereof was recorded, and he discovered it by an examination of the records; "that had said defendant exhibited said abstract of title to said plaintiff, or informed him in what respect said title of said defendant was claimed to be defective, said plaintiff could at once have informed said defendant that said abstract was not a true and correct abstract of title to said lands"; and "that plaintiff was not in any manner ever consulted by defendant in regard to said supposed defect of title." The court further finds that defendant acted in good faith in the

sale of the land, and in expending said sum of \$526 in attempting to cure the supposed defect in his title, but holds that he cannot compel plaintiff to stand one-half or any part of such expense.

We are of the same opinion. If defendant did not act in bad faith, he was, to say the least, grossly negligent. It does not appear that the plaintiff was not accessible and could not be communicated with in a reasonable time. This land was the only partnership property, and its purchase and sale was the only partnership business. It was not an act in the usual course of the partnership business, but one which went to the very foundation of the partnership. It is found by the court that the plaintiff, and not the defendant, conducted the negotiations for the purchase of this land, and procured the conveyance to defendant; and he should be presumed to have had some knowledge of the state of the title. No reason is given by defendant why all the negotiations for the ⁸² sale of the land and the purchase of this supposed title by him were kept secret from plaintiff. In every important exigency the partner about to act should consult the other partner, at least if there are no circumstances which excuse him from so doing.

The order appealed from should be affirmed.

So ordered.

Gilfillan, C. J., took no part.

PARTNERSHIP—DUTY TOWARD ONE ANOTHER.—The relation existing between partners is one of trust and confidence, and when dealing with each other in relation to partnership matters, they are required to make full disclosure of all material facts within their knowledge in any way relating to the partnership affairs: *Caldwell v. Davis*, 10 Col. 481; 3 Am. St. Rep. 599. See, also, the extended note to *Jones v. Dexter*, 39 Am. Rep. 461.

KIRK v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

[59 MINNESOTA, 161.]

CARRIERS—TERMINATION OF LIABILITY.—A railway corporation, leaving a portable package in one of its cars, instead of putting it in the freightroom, is answerable for the loss thereof by theft, though, had the consignee called for it, it would have been delivered to him two days previous to its loss. In the case of portable packages, a carrier cannot terminate its liability without removing them from the car to its freighthouse.

CARRIERS.—The burden of proving facts which terminate a carrier's liability as such, must be assumed by it.

S. L. Perrin and Lorin Cary, for the appellant.

P. P. Cady, for the respondent.

¹⁶² MITCHELL, J. This action was brought to recover the value of certain goods delivered by plaintiff to defendant, a common carrier, for transportation, and which were stolen while in defendant's possession. ¹⁶³ Both the place of shipment and the place of destination were on defendant's road. The goods were contained in a box, and weighed seventy-five pounds, and were of the value of about seventy dollars. The plaintiff shipped the goods consigned to himself. He did not reside, nor had he an agent, at the place of consignment, and his residence was unknown to the defendant. The car containing the box arrived at the place of destination about half past six o'clock on Thursday evening, August 10, 1893, but the goods were never unloaded from the car. The car was left "sealed," but not locked. The last that was seen of the goods was Saturday evening, when the defendant's agent saw them in the car. When plaintiff called for them, on Monday morning, it was discovered that someone had broken the seal of the car and stolen the box.

It does not appear where the car was left standing, or whether it was at a place suitable for the delivery of goods to consignee. There was evidence that the "station" was open for the delivery of freight on Friday and Saturday from 7 A. M. to 6:30 P. M., but there is no evidence that this box was ready for delivery during that time, although it is, perhaps, fairly inferable from the circumstances that, had plaintiff called for it on either of these days, defendant's agent could and would have gotten it for him out of the car. No reason was shown why defendant left the box in the car, instead of placing it in the freightroom. It does not appear that the defendant had no freightroom, or that there was any necessity for keeping such portable packages in the car, or that there was any general custom at that station of delivering such packages from the car to the consignees. On this state of the evidence, the court directed a verdict for the plaintiff.

The only question raised on this appeal is, whether the defendant's liability as carrier had terminated when the goods were stolen, or, at least, whether, under the evidence, that question should not have been left to the jury. This court has had occasion in at least three cases to consider somewhat at length the old and somewhat mooted question, when and under what circumstances the peculiar liability of a common carrier as such may be terminated before the goods have passed into the possession or custody of the consignee: *Derosia v. Winona etc. Ry. Co.*,

18 Minn. 133; *Pinney v. First Division etc. R. R. Co.*, 19 Minn. 251; ¹⁶⁴ *Arthur v. St. Paul etc. R. R. Co.*, 38 Minn. 95.

In the first of these cases, it was held that if the consignee resides elsewhere than at or in the immediate vicinity of the place of final destination, has no agent there, and his residence is unknown to the carrier (which was this case), the carrier can place the goods in its freighthouse, and after keeping them a reasonable time, if the consignee does not call for them, its liability as carrier ceases. We do not mean to lay down as an inflexible rule, applicable to all cases, that, in order to terminate the carrier's liability, the goods must be removed from the car and put into the carrier's freighthouse. The nature of some kinds of goods, such as coal, lumber, and the like, precludes this. It is usual for the consignees themselves to unload and carry away these kinds of freight directly from the cars. It is also true, as suggested by defendant's counsel, that there is nothing to prevent a carrier, at least under special circumstances, from using the car as its warehouse for the storage of freight. But in the case of portable boxes or packages of valuable merchandise, we think that, under any ordinary circumstances, public policy requires that it should be held the inflexible rule that, in order to terminate the carrier's liability, he must remove the goods from the car in which they were transported and place them for safe-keeping in his freighthouse. We will take notice of the fact that it is the general custom to do so with this class of goods, and to deliver them to the consignees from the freightroom, and not from the car. To allow the carrier to terminate his liability for such kinds of goods by any less formal and expressive act would be against public policy. The unloading of cars may be, and often is, delayed for the mere convenience of the carrier; and to permit him in such cases to say that the cars constituted his warehouse for the time being, and that, if the goods had been called for, they would have been delivered to the consignee, and therefore he is not liable for their loss, would inaugurate a very dangerous rule.

If the facts existed which had terminated defendant's liability as a common carrier, the burden was on it to prove them, and this it certainly failed to do, even under the most favorable view of the law. The court was right in directing a verdict for plaintiff. We are by no means sure that this direction would not have been ¹⁶⁵ correct, even conceding that defendant's liability was only that of a warehouseman; for it would seem grossly negligent to leave a car containing portable packages of valuable merchandise unlocked, and merely fastened with a strip of tin, called a "seal," which anyone could easily remove.

Order affirmed.

Gilfillan, C. J., absent on account of sickness, took no part.

CARRIERS—TERMINATION OF LIABILITY.—A carrier who wishes to wholly terminate his liability for goods must store them: Note to Gregg v. Illinois Central R. R. Co., 37 Am. St. Rep. 247; note to Schen v. Benedict, 15 Am. St. Rep. 429; and the note to Mobile etc. R. R. Co. v. Prewitt, 7 Am. Rep. 591.

ANDERSON v. MANCHESTER FIRE ASSURANCE Co.

[59 MINNESOTA, 182.]

INSURANCE — CONSTITUTIONAL LAW.—A statute directing the insurance commissioner of the state to prepare and adopt a blank policy, together with such provisions and conditions as may be added thereto, or indorsed thereon to form a part thereof, such form to conform as near as the same can be made practicable to the form known as the New York Standard Life Insurance Policy, and requiring all insurance corporations, after the adoption of such form, to use it in all policies for fire insurance, and all renewals thereof, does not, of itself, adopt the form referred to as in use in New York, but leaves the commissioner a discretion to add to, or omit from, the provisions of such policy, and is, therefore, void, because it delegates to the commissioner legislative power which can be exercised only by the legislative department of the state.

CONSTITUTIONAL LAW.—THE LEGISLATURE CANNOT DELEGATE to any person or body the power to determine what the law shall be, except when authorized by the constitution to do so.

INSURANCE—WAIVER.—The delivery of a policy of insurance, with knowledge of other insurance on the same property, waives the condition in the policy making it void if the assured has other insurance.

Action against an insurance company to recover damages sustained by the loss of a frame building from fire. At the time the policy was issued, the building was already insured in the sum of five hundred dollars, as was known to defendant's soliciting agent when he made a delivery of the policy, but consent to such insurance was not indorsed thereon. The plaintiff could not read or write English, and could converse in that language only imperfectly, and was not aware that the policy contained a stipulation against other insurance.

S. T. & William Harrison, and Kitchel, Cohn & Shaw, for the appellant.

John Jenswold, Jr., and Bunn & Hadley, for the respondent.

¹⁹¹ **CANTY, J.** This case was argued and decided in favor of appellant at the last term of this court. It having been then suggested that the laws of 1889, chapter 217, which provides for the preparation and adoption of the "Minnesota standard policy," was unconstitutional, for the reason that it attempted to delegate legislative powers to the insurance commissioner, a motion for reargument was made, on the ground of such unconstitutionality, the motion was granted, and the case has since been reargued.

¹⁹² Since the granting of the motion for reargument, the supreme court of Pennsylvania has declared a somewhat similar statute unconstitutional, as being an attempted delegation of legislative power: See *O'Neil v. American etc. Ins. Co.*, 166 Pa. St. 72; 45 Am. St. Rep. 650. It is now conceded by appellant that, if the Minnesota statute is the same as that of Pennsylvania, it would be unconstitutional. But, while the statute of Pennsylvania attempted to give the insurance commissioner power to adopt, as the standard policy, any form of insurance contract he saw fit, it is claimed that the Minnesota statute requires the insurance commissioner to adopt the New York standard policy, and gives him no discretion, as to the substance of the contract to be so adopted, and that, therefore, there was no such attempt to delegate legislative power to him. So far as it is necessary here to consider chapter 217 of the laws of 1889, it reads as follows:

"Section 1. The insurance commissioner shall prepare and file in his office on or before the first (1st) day of August, A. D. eighteen hundred and eighty-nine (1889), a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements, or conditions as may be indorsed thereon, or added thereto, and form a part of such contract or policy, and such form, when so filed, shall be known and designated as the Minnesota Standard Policy. Said insurance commissioner shall, within sixty (60) days from the passage of this act prepare, approve, and adopt a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements, and conditions as may be indorsed thereon, or added thereto and form a part of such contract or policy, and such form shall, as near as the same can be made applicable, conform to the type and form of the New York Standard Fire Insurance Policy, so called and known. Provided, however, that five (5) days' notice of cancellation by the company shall be given, and provided that proof of loss shall be made within sixty (60) days after a fire.

"Sec. 2. The insurance commissioner may call upon the attorney general for such assistance as to him may seem necessary in the preparation of the aforesaid standard insurance policy, and it is hereby made the duty of said attorney general to perform such service."

193 "Sec. 4. On and after the first (1st) day of January, A. D. eighteen hundred and ninety (1890), no fire insurance company, corporation, or association, their officers or agents, shall make, issue, use, or deliver for use, any fire insurance policy, or renewal of any fire policy, on property in this state, other than such as shall conform, in all particulars as to blanks, size of type, context, provisions, agreements, and conditions, with the printed form of contract or policy so filed in the office of the insurance commissioner, as provided for in the first (1st) section of this act, and no other or different provision, agreement, condition, or clause shall, in any manner, be made a part of said contract or policy, or be indorsed thereon or delivered therewith, except as follows, to wit."

Then follow provisions which authorize the insertion in the insurance policy of matters of description, and other particulars and provisions peculiar to the particular insurance company or the particular risk, and not inconsistent with the provisions or conditions of the standard policy. It is contended, in substance, that all of this statute above quoted which provides for the preparation and adoption of a standard form is surplusage, except the part of the laws of 1889, chapter 217, section 1, which provides that "such form shall, as near as the same can be made applicable, conform to the type and form of New York Standard Fire Insurance Policy, so called and known."

If this contention is correct, why were the provisions inserted, which immediately follow this, and require five days' notice of cancellation by the company, and provide for sixty days in which to make proof of loss? It is conceded by counsel for appellant that these identical provisions were in the New York standard form when this act was passed. If the legislature intended to require all of the provisions of that form to be adopted, why did they thus specify only those two?

Again, if the insurance commissioner had no discretion, and was to act merely as a copyist of the New York form, why was it deemed necessary to provide for him the assistance of the attorney general in his onerous duties of copying the same? Again, why should the words "provisions, agreements, and [or] conditions" occur so often in the statute where they are of no particular importance, and be left out in the very connection and very

place where they would be all-important? Again, the statute provides that "such ¹⁹⁴ form shall, as near as the same can be made applicable, conform to the type and form of the New York 'standard.' "

It is insisted that this authorizes only such changes as striking out the words "New York," and inserting "Minnesota," and that, for the purpose of permitting such changes, the words, "as near as the same can be made applicable," were used. There are no such changes to be made. The words "New York" do not occur in the provisions of the New York standard. There is not a word in the provisions of the New York form which it is necessary to change in order to apply the form to Minnesota. Then the legislature must, at least, have intended to give the insurance commissioner power to exercise his judgment in determining which of the provisions of the New York form were applicable to Minnesota, and which were not, and this would be an unconstitutional delegation of power. Conceding, without deciding, that this would be a proper way to make the New York form a part of the Minnesota statute, if the legislature intended to adopt the New York form, they could have said so in a very few words.

The words "type and form," above quoted, are written together in the same connection, and it is fair to presume that they both refer to matters of the same general kind; that is, to matters of form. Construing these words in connection with the other provisions of the statute, we are of the opinion that they are equivalent to "type and style," that the legislature intended to give the insurance commissioner power to insert in the standard form such provisions as he saw fit, and that, while it might be materially different from the New York form in substance, it should conform to it, as far as practicable, in the size and character of the type, and in the arrangement of provisions. The object of this was obviously to prevent the use of type so small and obscure, and the arrangement of provisions so misleading, that an ordinary man would not read these provisions, and, if he did, could not understand them.

Then the legislature attempted to clothe the insurance commissioner with power to enact a general law, prescribing what provisions and conditions should be inserted in a policy of insurance, and what should not. There was no reason why the legislature could not pass this act as well as the commissioner. There may be ¹⁹⁵ necessity for police regulation in the insurance business, for the protection of the insured and the insurer; and the regulation of many matters of detail, exceptional matters, and

matters which cannot well be regulated by the general provisions of law may, perhaps, be delegated to such a commissioner. But this is not such a matter. There is no necessity for changing, from time to time, between legislative sessions, the provisions which should be put in such a standard form, so as to meet changing conditions (see *State v. Chicago etc. Ry. Co.*, 38 Minn. 301), and no such power was given to the commissioner. He was to prepare and adopt a standard form, once for all, and, when so adopted, it was to remain irrevocable until changed by subsequent legislation. A clearer instance of an attempt to delegate legislative power could hardly be suggested.

As said in *State v. Young*, 29 Minn. 551: "It is a principle not questioned, that, except where authorized by the constitution, as in respect to municipalities, the legislature cannot delegate legislative power—cannot confer on any body or person the power to determine what shall be law. The legislature only must determine this." We are of the opinion that the laws of 1889, chapter 217, is unconstitutional and void, and therefore the provision of said statute prohibiting the parties from waiving any of the provisions of the standard policy has no effect, and does not prevent a parol waiver of the condition in the policy declaring such policy "void if the insured now has, or shall hereafter make or procure, any other contract of insurance." This being so, the contract of insurance is merely the voluntary contract of the parties, not restricted by any such statute; and, by delivering the policy here in question, knowing of the existence of other insurance on the property, the defendant waived this condition of its policy, and plaintiff is entitled to recover: *Brandup v. St. Paul etc. Ins. Co.*, 27 Minn. 393; *First Nat. Bank v. American Cent. Ins. Co.*, 58 Minn. 492; *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129.

This disposes of all the questions in the case, and the order appealed from is affirmed.

INSURANCE—LEGISLATURE—DELEGATION OF POWER.—Whether the legislature may itself prescribe a form of contract of insurance or not, it cannot delegate the power to an insurance commissioner to prescribe a standard policy of insurance: *O'Neil v. American etc. Ins. Co.*, 166 Pa. St. 72; 45 Am. St. Rep. 650, and note.

INSURANCE—PRIOR—VIOLATION OF CONDITION AGAINST ADDITIONAL.—If an agent knows of a prior insurance, which he mistakenly believes to have expired, and, acting under such belief, procures a second policy on the same property, which contains a condition that it shall be void if the insured "shall have any insurance on the property hereby insured, not indorsed, known, or consented to by this company, or its authorized agent, in writing, this policy shall be void," this pre-existing policy is a breach of the condition, and avoids the second policy: *Sanders v. Cooper*, 115 N. Y. 279; 12 Am. St. Rep. 801.

GIBB v. PHILADELPHIA FIRE INSURANCE COMPANY.

[59 MINNESOTA, 267.]

INSURANCE, CHANGE OF INTEREST.—The sale of real property and the receipt of part of the purchase price, with an agreement, on completion and payment of the balance, that the purchaser should be entitled to possession until he made default in such payment, is such a change as renders void a pre-existing policy of insurance containing a stipulation that it shall become void if any change, other than by the death of the assured, shall take place in the interest, title, or possession of the property insured.

AN INSURER IS ENTITLED TO BE SUBROGATED to the rights of a mortgagee on paying a policy of insurance in his favor, where such policy, as against the mortgagor, has become void because of a breach of some of the conditions thereof.

Kitchel, Cohn & Shaw, for the appellant.

Fred W. Reed, for the respondents.

272 CANTY, J. On February 29, 1892, the plaintiff Gibb was the owner in fee simple of the premises in question, subject to a mortgage of twelve hundred dollars, held by the plaintiff Hilles. On that day, defendant issued a policy of insurance insuring Gibb to the amount of two thousand dollars, for three years from and after that day, against loss by fire to the buildings on the premises, loss, if any, payable to Hilles, as her interest may appear; but providing that if, in case of loss, the insurer is not liable to the mortgagor or owner, it shall be subrogated to the rights of the mortgagee under her mortgage, and, upon paying the full amount due on the mortgage, shall receive an assignment of it. This mortgage clause also provided that the policy should not be invalidated as to the mortgagee by any act of the owner, or by any change in the title or ownership of the premises.

On February 28, 1893, there was a loss by fire amounting to fourteen hundred and sixty-two dollars and sixty-two cents. The plaintiffs brought this action to recover this loss. The case was tried by the court without a jury, and judgment was ordered in favor of Hilles for twelve hundred dollars, the amount of her mortgage, and in favor of Gibb for the balance of said amount of the loss. From the judgment entered thereon, defendant appeals.

The appellant concedes that the plaintiff Hilles is entitled to recover, but contends that a breach occurred, prior to the fire, which avoided the policy as to Gibb; that he is not entitled to recover; and that defendant is entitled, on payment to Hilles of the amount of her mortgage, to be subrogated to her rights under

the mortgage. The policy contains the following provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise."

It is found by the court that on March 23, 1892, plaintiff made a contract in writing with one Maggie J. Kelly, whereby he sold and agreed to convey to her the premises, consisting of five lots, by deed ²⁷³ of warranty, on prompt and full performance by her of the agreement, and she agreed to pay therefor the sum of two thousand five hundred dollars—three hundred dollars cash, and one thousand dollars in installments of fifty dollars every sixty days thereafter until paid, the balance to be paid by her in assuming said mortgage—she to have possession of the premises until default in payment; and, in case of such default, she agreed to surrender possession on demand, and that the agreement should be void at the option of the vendor. That at and from the time of making the policy of insurance, until the time of making the contract of sale, the buildings had been unoccupied, and that, on the making of said contract of sale, said Kelly entered into the possession of the buildings and premises, and occupied the same until the time of the fire, and made all her payments during that time, and was not in default in any manner upon said contract.

It is contended by appellant that, by the transactions with Kelly, there took place a change in the interest, title, and possession of Gibb, and the condition against any such change was broken, and the policy avoided as to him. It seems to us that there was a breach in the condition against any change of interest. It is not claimed by respondents that there was any waiver of this condition, and the authorities cited by counsel are nearly all cases where the breach claimed was not of a condition against a change of interest, but a change of title. It is held by the great weight of authority that, where the condition is against any change in the title, there is no breach unless there is a change in the legal title—that as long as the insured retains the legal title and an insurable interest in the premises, the policy is not avoided by a transfer of the equitable title or of equitable interests; but we cannot apply this doctrine to a condition against any change of interest. The terms are not synonymous, as contended by counsel. The word "interest" is broader than the

word "title," and includes both legal and equitable rights. It is not necessary to consider the question of the change of possession, except so far as it has an influence on the change of interest by strengthening and fortifying the interest acquired by Kelly. This disposes of the case.

The plaintiff Hilles is entitled to judgment for the sum awarded her, but, upon payment of the same, the defendant is entitled to be subrogated to her rights under her mortgage, and the defendant is ²⁷⁴ entitled to judgment against the plaintiff Gibb that he take nothing by this action. The judgment appealed from should be reversed, with directions to enter judgment in conformity with this opinion.

So ordered.

Gilfillan, C. J., absent on account of sickness, took no part.

INSURANCE—CHANGE OF INTEREST.—An executory contract for the sale of insured premises does not violate the prohibition in the policy against sale or assignment: *Washington etc. Ins. Co. v. Kelly*, 32 Md. 421; 3 Am. Rep. 149. See the extended note to *Morrison v. Tennessee etc. Ins. Co.*, 59 Am. Dec. 304.

INSURER'S RIGHT TO SUBROGATION.—An insurer who has paid a loss to a mortgagee is not entitled to be subrogated to the mortgage debt while any part of it remains unpaid. In other words, the insurer is not entitled to subrogation, if any part of the debt is unpaid, unless he tenders to the mortgagee the balance due: *Phoenix Ins. Co. v. First Nat. Bank*, 85 Va. 765; 17 Am. St. Rep. 101, and note.

GUILFORD v. WESTERN UNION TELEGRAPH COMPANY.

[59 MINNESOTA, 332.]

CORPORATIONS—FOREIGN, JURISDICTION OVER.—If a foreign corporation is allowed to do business and maintain suits in this state, justice requires that we should here enforce its liabilities existing in favor of our citizens.

CORPORATIONS, FOREIGN, COMPELLING ISSUING OF STOCK BY.—The courts of this state have jurisdiction to compel a foreign corporation doing business therein to issue a certificate of stock to a citizen of this state in lieu of a pre-existing certificate which has been lost.

RES JUDICATA.—A judgment denying the right of the plaintiff to compel the issuing to him of a certificate of stock in lieu of one which has been lost, because he has not given a bond of indemnity, is not conclusive against him in another suit brought for the same purpose, without first giving a bond, when more than four years have intervened between the two suits, during which time the alleged lost certificate has not been heard from, and no other claimant has appeared therefor, and the legislature has enacted a law providing for the renewal of stock certificates which have been worn out, lost, or destroyed.

CORPORATIONS, FOREIGN, CONFLICT OF LAWS.—The general law of the state in which a corporation was formed, not constituting part of its charter, but providing a method of obtaining new stock certificates in place of originals which have been lost, is not binding upon a citizen of another state, nor can it exclude him from any of the remedies available in that state to compel the issuing to him by such corporation of a certificate of stock to replace the one which has been lost.

CORPORATIONS.—THE CUSTOM of a corporation to issue a certificate of stock to replace one which has been lost only upon execution of a bond of indemnity, is not binding upon its stockholders, nor does it deprive them of any remedy which they may otherwise have to compel the issuing of such certificate without the giving of indemnity.

CORPORATIONS, LOST CERTIFICATE — INDEMNITY.—Before issuing a new certificate of stock in place of one alleged to have been lost, indemnity cannot be exacted by the corporation, where a statute of the state provides that if the evidence is clear that such certificate has been lost or destroyed, and that it has not been heard of for the period of seven years, it shall be the duty of the corporation to issue a new certificate without indemnity, and it appears that the original certificate disappeared twelve years prior to the trial, during all of which time regular dividends had been declared on the stock, and no claimant to either the stock or the certificate had appeared, other than the person to whom it issued and his heirs at law. Independently of the statute, the right to a new certificate should, under the circumstances, be affirmed, though the applicant is unable to give any indemnity.

Proceeding to compel the issuing to the plaintiff of certificates of stock by the defendant corporation in lieu of originals alleged to have been lost. These originals had been issued to Asa Guilford, and were in his possession in February, 1882, at which time, being nearly eighty years of age, he lost them in the city of New York. He immediately gave defendant notice of the loss, and nothing has since been heard of the certificates. In June, 1882, he commenced an action against the defendant for new certificates, which defendant offered to give if he would give a bond of indemnity, with sureties, in twice the par value of the stock. Such indemnity was not offered or given, and the plaintiff was denied relief in that action, and judgment entered in May, 1883, because of the failure to give such indemnity. In July of the same year, Asa Guilford assigned the stock to his son, the plaintiff in the present action. This son, in September, 1888, commenced another action against the defendant for a new certificate, in which he was defeated for the same reasons, prevailing in the first suit. The father afterward died intestate, leaving the plaintiff as his sole heir at law. In May, 1893, the present action was commenced by plaintiff, and resulted in a decision of the court, that plaintiff was the owner of the stock and that the

certificates were lost, but that, because of the judgments in the former action and the failure of the plaintiff to tender a bond of indemnity, judgment must again be entered against him. From this judgment so entered, and from an order of court denying a new trial, the plaintiff prosecuted the present appeal.

Jonas Guilford, pro se.

C. M. Ferguson, for the respondent.

338 MITCHELL, J. This action was brought to have the plaintiff adjudged the owner of certain shares of the stock of the defendant company, and to compel the company to issue to him new certificates therefor in place of the originals, which are alleged to have been lost, and, if the defendant refuses to issue the same, that plaintiff have judgment against it for the value of the stock.

339 It is not questioned but that one Asa Guilford, plaintiff's father, now deceased, was once the owner of the stock, and that plaintiff, a citizen of this state, is his assignee, sole heir, or next of kin, as well as the administrator of his estate, and hence the owner of the stock, unless Asa Guilford had, in his lifetime, previously transferred it to someone else. The stock certificates are alleged to have been lost by Asa in February, 1882. The defendant has always been willing to issue to plaintiff new certificates, on condition that he first execute to it a bond, with two sureties, in double the amount of the value of the stock (over thirty-five thousand dollars), to indemnify it against the original certificates, in case they should turn up in the hands of a third party. This condition the plaintiff has been unable to comply with. This is the third action which has been brought for the same relief—one in 1882, by Asa Guilford; the second, by plaintiff, in 1888, affirmed on appeal (43 Minn. 434); and the present action, in 1893—the judgment in each case being the same, to wit, that the plaintiff was entitled to new certificates only on first giving the bond required by the defendant. The facts in the present action are the same as in the previous actions, except the additional lapse of time during which the original certificates still remain undiscovered, and no other claimant for the stock has appeared, and that in the mean time the legislature of this state has enacted a statute (Laws 1893, c. 45) providing for the renewal of stock certificates when worn out, lost, or destroyed.

The defendant is a corporation organized under the laws of the state of New York, where its principal place of business is located, and where all its general officers reside, and where all its

The only business transacted is the maintenance of telegraph lines and the management of property for which purpose exclusively it has been organized.

The court in its answer and on the argument, (and the court in the appeal in the former action) held that the state has no jurisdiction of the subject matter of the action because it pertains solely to the management of the internal affairs of a foreign corporation.

It is well settled that courts will not exercise jurisdiction over foreign corporations, or interfere with their internal affairs. Such matters must be left to the state creating the corporation.

There is a broader and deeper foundation than the ordinary sense of that word.

The state is the sovereign of the state (from which it derives its power) over foreign corporations.

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miums. And the court says, upon plaintiff's bill it appears that there is not even an existing contract between the parties. The proceeding is based upon a past relation growing out of a contract made without the jurisdiction, which, by its own terms, has ceased to be operative, and which ³⁴¹ the plaintiff seeks to revive as an executory obligation, and reinstate him as a member of the corporation, his right to which necessarily depended on the local statute law of the state which created the corporation.

In *North State etc. Min. Co. v. Field*, 64 Md. 151, the corporation had declared the plaintiff's stock forfeited for the nonpayment of an assessment, and the latter brought suit to be reinstated as a stockholder in the books of the company, and restored to all his rights as such, alleging that the assessment was illegal and void. As the legality of the assessment and the right of the company to declare the stock forfeited for its nonpayment depended on the charter of the company and the peculiar statute law of the state creating it, the court refused to entertain the bill. But, in the present case, there is no question as to the issue, validity, or forfeiture of the stock. There is not even any controversy as to the right of the plaintiff to a certificate as evidence of his title. The only dispute is over the terms or conditions upon which that certificate shall be issued. We do not see how the granting of such relief is, in any proper sense, the exercise of visitorial powers, or an interference with the management of the internal affairs of the defendant.

Statements are sometimes found to the effect that where the act of the corporation complained of affects a person solely in his capacity as a member of the corporation, or where the rights of a person grow solely out of his membership in the corporation, and not out of some external transaction, the subject relates to the management of the internal affairs of the corporation, over which the courts of another state should not assume jurisdiction. Such general statements must always be construed in connection with the particular facts of the cases in which they are used. Moreover, such statements are not strictly correct as abstract propositions, in the broad and unqualified sense in which they are sometimes understood. We think there are cases; and that this is one of them, where, although the rights of a party grow out of his membership in the corporation, yet, as the matter affects only his individual rights under the contract by which the stock was issued, therefore, an enforcement of those rights will not be an interference with the internal management of the corporate affairs within the meaning of the rule.

³⁴² If, upon principles of law or comity, foreign corporations

stock and other books are kept. The only business transacted by it in this state is the maintenance of telegraph lines and the transmission of telegrams, for which purpose exclusively it has local agents here.

1. The defendant, both in its answer and on the argument, makes the point (not raised on the appeal in the former action) that the courts of this state have no jurisdiction of the subject matter of the action, because it pertains solely to the management of the internal affairs of a foreign corporation.

The doctrine is well settled that courts will not exercise visitorial ³⁴⁰ powers over foreign corporations, or interfere with the management of their internal affairs. Such matters must be settled by the courts of the state creating the corporation. This rule rests upon a broader and deeper foundation than the mere want of jurisdiction, in the ordinary sense of that word. It involves the extent of the authority of the state (from which its courts derive all their powers) over foreign corporations. The only difficulty is in drawing the line of demarkation between matters which do and those which do not pertain to the management of the internal affairs of a corporation.

To entertain an action to dissolve a corporation; to determine the validity of its organization; to determine which of two rival organizations is the legal one, or who of rival claimants are its legal officers; to restrain it from declaring a dividend, or to compel it to make one; to restrain it from issuing its bonds, or from making an additional issue of stock would clearly all be the exercise of visitorial powers over the corporation, or an interference with the management of its internal affairs. But the distinction between any of these cases and the one at bar seems to us very apparent. None of the cases cited by defendant's counsel fully support his contention. Those which at first sight seem most nearly in point are *Smith v. Mutual Life Ins. Co.*, 14 Allen, 336, and *North State etc. Min. Co. v. Field*, 64 Md. 151, both of which, we think, may be distinguished from the case at bar.

In the first of these cases, the plaintiff himself was a citizen of Alabama, and had never lived in Massachusetts—a fact upon which the court lays much stress, and which alone would probably have justified a court of equity, in the exercise of its discretion, in declining to entertain the bill. Moreover, in that case, the insurance company, a mutual one, had declared the plaintiff's policy forfeited for the nonpayment of premiums, and the relief sought was to have the policy revived or restored on the ground that the default of the plaintiff was excusable because of the existence of facts which rendered it impossible to pay his pre-

miums. And the court says, upon plaintiff's bill it appears that there is not even an existing contract between the parties. The proceeding is based upon a past relation growing out of a contract made without the jurisdiction, which, by its own terms, has ceased to be operative, and which ³⁴¹ the plaintiff seeks to revive as an executory obligation, and reinstate him as a member of the corporation, his right to which necessarily depended on the local statute law of the state which created the corporation.

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³⁴² If, upon principles of law or comity, foreign corporations

are allowed to do business and maintain suits in another state, the general rule should be, that they are liable to be sued in the same jurisdiction. Their rights and liabilities in that regard ought to be reciprocal. If we recognize their existence for one purpose, we ought also for the other. If our courts admit and vindicate their rights, justice requires that we also enforce their liabilities, and that, before we send our own citizens to a foreign jurisdiction for redress, it should be very clear that the subject of the action is beyond the limits of the power or sovereignty of the state over the foreign corporation. If a citizen of this state held a certificate of stock in a foreign corporation, which was alleged to have been illegally issued, or to have for some cause become forfeited, we do not think there would be any doubt but that our courts would entertain a suit by the corporation to compel its surrender and cancellation. If so, why ought not a citizen of the state to be allowed to maintain an action to compel the issue to him, as evidence of his title, of a new certificate in place of one that has been lost or destroyed?

It is urged that, if the courts of this state entertain jurisdiction of such a case, they may impose different conditions upon the issue of the certificate from those that might be imposed by the courts of New York, or of other states under the same state of facts. This must be conceded. It is one of the necessary imperfections in the administration of justice that courts of different, and even of the same, jurisdictions will differ as to the law applicable to the same state of facts. But it was never heard that this, of itself, was any reason why a court should not exercise jurisdiction. It is also contended that the courts of this state ought not to entertain the action, because they have no means to enforce their decree by compelling the issue of a certificate.

It is undoubtedly true that courts will not entertain an action, where it is apparent that if a judgment was rendered they would be wholly unable to enforce it. But the mere fact that they may be unable to compel specific performance in a particular way is no reason why the suit should not be entertained. If the defendant should refuse to issue certificates in accordance with the judgment, it would be entirely competent for the court, in accordance ³⁴³ with the prayer of the complaint, to render judgment for the value of the stock. Our conclusion is, that the action can be maintained. In so holding, we do not wish to be understood as deciding that the courts of this state could or should assume jurisdiction of every suit to compel the issue of stock certificates by a foreign corporation. We can conceive that many such cases might arise that would include elements

involving the management of the internal affairs of the corporation. Our decision is confined to the facts of this case.

2. It is contended by defendant that it is *res judicata* by the judgments in the former actions that plaintiff is entitled to new certificates only upon the condition therein prescribed, to wit, the giving of a bond of indemnity, with two sureties, to the amount of double the value of the stock. We think not. The facts that over four and a half years have elapsed since the last action, and that during that time the stock certificates have not been heard from, and no other claimant, for either the stock or the dividends upon it, has appeared, to say nothing of the subsequent declaration of legislative policy by the laws of 1893, chapter 45, as to the terms upon which new stock certificates shall be issued, have so materially changed the situation that it does not follow that the same conditions should be imposed now which were imposed at the dates of either of the former judgments. Whether the proper practice in such a case is to bring a new action, or, upon supplemental complaint, to ask for the modification of the decree in the former suit, is a question not before us, and which we need not consider.

3. The defendant pleaded in its answer a general law of the state of New York (Laws 1873, c. 151, substantially re-enacted by Laws 1892, c. 688, secs. 50, 51), providing a method of obtaining new stock certificates in place of originals which have been lost. This statute, it is claimed, is binding on the plaintiff, as furnishing him his exclusive remedy. There is nothing in this point. This statute is no part of the charter of the defendant, which constitutes the agreement between the corporation and its stockholders, and which alone is recognized in other states. It is merely one of the general laws and regulations of the state of New York affecting the remedy, which govern only within the limits of the state enacting them.

344 4. The defendant also alleges a rule of the corporation providing that new certificates in place of lost certificates of its capital stock shall only be issued upon the condition, among others, that the applicant shall execute to the company a bond, with two sureties, in double the par value of the stock, to indemnify it against the original certificates. This rule, it is claimed, is binding upon plaintiff as part of the contract between the corporation and all of its stockholders. The evidence, however, fails to prove any such rule or by-law. All that appears is, that it has been the uniform custom or practice of the defendant to issue new certificates only upon the execution of such a bond.

5. This brings us to the last question in the case, viz., whether, upon the facts, the plaintiff is entitled to new certificates without being required to give the bond with sureties exacted by defendant. The evidence of the loss of the original certificates, unassigned by the then holder, Asa Guilford, is, in our opinion, as clear and conclusive as it is usually possible to produce. The most conclusive proof of that fact is, that although the certificates disappeared over twelve years ago, during all of which time regular dividends on the stock have been declared, yet they have never been heard of, and no other claimant for either the stock or dividends has ever appeared.

Chapter 45 of the laws of 1893 provides: "If the evidence is clear that said certificate has been lost or destroyed, and it has not been heard of for a period of seven years, it shall be the duty of said corporation to issue a new certificate without indemnity."

We do not agree with plaintiff's contention that the effect of this statute is to give the courts of this state jurisdiction over foreign corporations which they would not otherwise have. Neither are we prepared to assent to the contention of defendant, that it applies only to domestic corporations. There is nothing in the language of the act inconsistent with the view that it is applicable to all corporations, whether domestic or foreign, in all cases of which the courts have jurisdiction according to existing rules of law, and that, as a declaration of legislative policy relating merely to the remedy, it was intended to be binding on the courts in all cases falling within their jurisdiction. If this is so, it would be decisive of this case. But, independently of the statute, we are of ³⁴⁵ opinion that, upon the facts, the plaintiff is entitled, upon general legal principles, to new certificates, without being required to give the bond exacted by defendant.

In the first place, under the facts stated at the outset, and about which there is no dispute, the case stands precisely as if Asa Guilford, admittedly once the owner of the stock, was the plaintiff. The only liability or chance of loss on part of the company which it is pretended could result from its issuing new certificates arises out of the possibility that it may be untrue that Asa Guilford lost the certificates unassigned, but that he may have assigned them to some other person, or may have lost them with an assignment indorsed, but blank as to the name of the assignee, and that the certificates may yet turn up in the hands of an innocent purchaser for value. But these stock certificates are not negotiable. Neither are they the stock, but merely the evidence of the title to it. If the defendant would be liable to the holders of the original certificates in case they

appear after the issue of new ones, it must be on the ground that it will be estopped to deny their title to the stock. In a stock certificate, the corporation certifies that, at the date of its issue, the person therein named is the owner of the specified number of shares of its stock. That fact it would undoubtedly be estopped to deny, as against a bona fide purchaser for value. But the certificate contains no representation or warranty that the party to whom it is issued will continue to be the owner of the stock for any particular length of time, or until some future act is done or event occurs. If any such representation is to be read into the certificate, it must be by implication. It certainly cannot be found in its language. The only authority for reading any such implied representation into a stock certificate is certain dicta in *Bank v. Lanier*, 11 Wall. 369, and *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

In the first of these cases, a remark is made, to the effect that the issuing of a certificate amounts to a notification and assurance to all persons interested to know that the corporation will not transfer the stock to anyone not in possession of the certificate.

In the second case, it is said that a stock certificate is a continuing affirmation of the ownership of the specified amount of stock, by the person designated therein or his assignee, until it is withdrawn ³⁴⁶ in some manner recognized by law, and that a purchaser in good faith has a right to rely thereon, and to claim the benefit of an estoppel in his favor as against the corporation. Notwithstanding that these dicta are quoted approvingly by this court in *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 186, we do not think that they are fully supported by the authorities, or contain an accurate statement of the law, at least in the broad and unqualified terms in which they are expressed. If they are, then it seems to us that a corporation could never be compelled to issue a new or duplicate certificate in place of one that was lost or destroyed, and could never safely do so, however clear and strong the proof of the loss. Neither do we see how the purchaser of corporate stock at an execution sale could ever get any evidence of his title, except in those exceptional cases where the officer executing the writ happened to succeed in getting possession of the stock certificate. It seems to us that if there is any liability on part of the corporation, or any estoppel against it in such cases in favor of the holder of the original certificate, it must be predicated on the ground of negligence or want of reasonable care, and not upon the theory of an implied continuing affirmation contained in the certificate.

It is, of course, well understood that in business circles corpo-

rate stock is bought and sold by the assignment and delivery of the certificate. Frequently, an assignment is indorsed with the name of the assignee blank, and the stock is then sold by the mere delivery of the certificate, the last holder having the right to fill up the blank. It is also the general custom of corporations not to make a transfer of stock on their books, or to issue a new certificate, without the presentation, and surrender, of the original. In view of this, reasonable care would undoubtedly require that, under any ordinary circumstances, a corporation should not issue a new certificate without the surrender of the original. It would also doubtless require that they should never do so without quite clear proof that the applicant is entitled to it, and that the original was actually lost or destroyed, of which facts lapse of time without the appearance of any rival claimant would be the most satisfactory evidence.

But if the corporation, in the exercise of proper care, does issue a new certificate, we do not see how it could suffer any loss, even ³⁴⁷ if the original certificate should afterward turn up. If there is any contest, it would be between the holders of the two certificates, as to which was the owner of the stock. Moreover, in this case, if the original certificate should ever appear in the hands of another claimant, it seems to us clear that he would be estopped from claiming any damages against the defendant by reason of his own laches in neglecting for over twelve years either to claim the dividends or to present his certificate and demand a transfer of the stock to himself on the books of the company.

The cause is remanded, with directions to the court below to modify its judgment in accordance with this opinion.

Gilfillan, C. J., absent on account of sickness, took no part.

Canty, J., took no part.

CORPORATIONS—FOREIGN—JURISDICTION OVER.—A foreign corporation doing business in another state, and having there business offices and agents, is subject to the jurisdiction of the courts of that state: Note to *Reyer v. Odd Fellows' etc. Assn.*, 34 Am. St. Rep. 293. See, also, the notes to *Aspinwall v. Ohio etc. R. R. Co.*, 83 Am. Dec. 334, and *Molyneux v. Seymour*, 76 Am. Dec. 670.

CORPORATIONS—FOREIGN—CONFLICT OF LAWS.—A corporation which performs corporate acts in a state other than its domicile, and seeks to enforce rights there, can exercise no exceptional rights and privileges which are conferred by the law of its creation, if such enforcement involves a breach of the public policy or statutory system of the state where such rights are sought to be enforced: *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194, and note; but see *American Water Works Co. v. Farmers' Loan etc. Co.*, 20 Col. 203; 46 Am. St. Rep. 285, and note.

ANCHOR INVESTMENT COMPANY v. KIRKPATRICK.

[69 MINNESOTA, 378.]

GUARANTY, ASSIGNMENT OF.—If a person guarantees the payment to a corporation of any and all indebtedness or liability then or thereafter owing to it from another designated person, and notes subsequently executed by the latter to the former are assigned by him, together with all securities he may hold securing any property or indebtedness, the assignee is entitled to the benefit of the guaranty and may maintain an action thereon against the guarantor.

Young & Lightner, for the appellant.

S. M. Magoffin, for the respondent.

³⁸⁰ BUCK, J. In the month of April, 1892, the Columbia Electric Company executed and delivered to the Commercial Bank of St. Paul its four promissory notes, amounting to the sum of eleven thousand dollars and interest, each note payable fifteen days after its date. At the time said notes were given, the bank held a continuing guaranty in writing, signed by the defendants, whereby they guaranteed, unconditionally ³⁸¹ and at all times, the payment to said Commercial Bank of St. Paul of any and all indebtedness or liability now or hereafter owing to said bank by the Columbia Electric Company, not to exceed the sum of ten thousand dollars, and waive any and all demands of payment and notice of protest or default.

On the twenty-eighth day of February, 1893, and after the maturity of these notes, the Commercial Bank of St. Paul assigned them in writing to this plaintiff, and the assignment, after describing the notes, contained these words: "Together with all securities which said bank may hold, securing any property or indebtedness."

The plaintiff brought this action against the defendants as guarantors of the payment of said notes. The defendants interposed an answer consisting of a general denial. There was no controversy as to the making and delivery of the notes, and, on the trial, it was admitted that they represented an indebtedness owing from the Columbia Electric Company to the Commercial Bank which had not been paid, and that the notes had been assigned to the plaintiff.

The only question raised upon the trial, as appears from the evidence, was as to the assignability of the guaranty. This question was raised when the plaintiff offered the guaranty in evidence, to which the defendant objected, upon the ground that it was immaterial, irrelevant, incompetent, and by its terms is a personal agreement, and is not assignable or negotiable, which

objection was sustained by the court, and the plaintiff duly excepted. On the trial, it was admitted that plaintiff was the holder of the notes, and that they had been assigned to it. On motion of the defendant, judgment was ordered by the court against the plaintiff. By the terms of the written guaranty, it was to remain in full force until revoked in writing. It was dated September 21, 1891, and expressed upon its face that it was given for a valuable consideration.

There can be no question but that the Commercial Bank could have brought suit directly in its own name upon this guaranty, as it was expressly given to secure to the bank any and all indebtedness or liability which then existed, or which should thereafter exist, on the part of the Columbia Electric Company to the bank, in whatever manner any such indebtedness or liability may have been, or might thereafter be, created. Here was a legal liability on the part of the guarantors which attached to any indebtedness which ³⁸² the Columbia Electric Company owed the bank. It did owe the bank the indebtedness represented by these notes. There was a legal contract between the guarantors and the bank to pay a certain indebtedness held by the bank, to wit, these notes. There can be no question but that the notes could be transferred or assigned. But they represented the same indebtedness in the hands of the bank that the guaranty did, and which it also held. Why should they not be assignable together, in and as one transaction, and as a proper, legitimate mode of doing business?

The terms of the guaranty were unusually broad. The terms of the assignment were broad enough to include an assignment of this guaranty; and, unless forbidden by some rigid rules of law, the notes and the guaranty of their payment should pass together. The guaranty was executed for the benefit of the bank. That is too apparent to need discussion. It, however, guaranteed the payment to the bank of the indebtedness of only one party, viz., the Columbia Electric Company. If the guarantors had paid these notes of ten thousand dollars to the bank, they would have done just what they had agreed to do by the terms of their guaranty. If they paid the same amount to this plaintiff as the assignee of the notes and guaranty, they are in no way harmed or damaged. The change is as to the plaintiffs or parties in interest, not as to any greater or less liability upon the part of the guarantors. There are no restrictive terms in the guaranty as to its assignability; that is, there are no terms which make it a special guaranty, applicable only to the party to whom it was given, to wit, the Commercial Bank. But, even in

cases of ordinary special guaranty, the guaranty is assignable after default, and when a cause of action has arisen thereon: *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273; 45 Am. Rep. 204.

Now, the Commercial Bank paid a valuable consideration for the benefit of this guaranty. It is so expressed in the instrument. Why should it not have the full benefit of what it paid for? The right of assignment was a valuable right to the bank. Its contract with the defendants should be construed as other contracts are construed; that is, to carry out the intention of the parties. Construing it as it appears upon its face, it was the intention of the parties that just such an indebtedness as this, owing the bank by the Columbia Electric Company, should be paid. That obligation can be discharged by paying it ³⁸³ to this plaintiff, as well as to the bank. The gist of the obligation is payment of one or more debts. The party to whom it is under obligation to pay is immaterial, providing it was a fair business transaction between the bank and the Columbia Electric Company, and came within the terms of the guaranty. The guaranty should therefore go with the debt it secures. The plaintiff is the owner of the notes, and is the real party in interest. This guaranty is a chose in action, and the party for whose benefit it was made should have the right to make it as effectual and beneficial as possible.

In the case of *Thalhimer v. Brinckerhoff*, 3 Cow. 645, 15 Am. Dec. 308, the chancellor, in giving his decision upon the general principles applicable to the transfer of causes of action, uses this very sensible language: "But the rule of the common law, that rights of action cannot be assigned, has in modern times been reversed; the apprehension that justice would be trodden down if property in action should be transferred is no longer entertained; and the ancient rule now serves only to give form to some legal proceedings. In courts of equity, this rule was never followed, and those courts have always considered and treated the rule as unjust, and have supported assignments of rights of action. Experience has fully shown, not only that no evil results from the assignments of rights of action, but that the public good is greatly promoted by the free commerce and circulation of property in actions, as well as of property in possession."

In a general sense, this language is applicable to this case, and confirmatory of the views which we have endeavored to express. We are of the opinion that the instrument of guaranty was assignable, and that by such assignment the plaintiff became the

true owner thereof, and that it was entitled to bring this action for its use and benefit: See *Schlieman v. Bowlin*, 36 Minn. 198.

It is contended by the respondent that the appellant failed to prove the making or delivery of the instrument of guaranty, and that the proof offered in respect to the guaranty was inadmissible under the allegations of the complaint. The record does not disclose the fact that any such objections were raised on the trial, but the fact does not distinctively appear that the only ground of objection was that the guaranty was not assignable. The defendant did not call the attention of the court to any other point, and no other was ruled upon by the court. Nor does the record show that any such points were raised ³⁸⁴ or ruled upon by the court on the motion for a new trial. Having stated his specific grounds of objections, he must be limited to them, and not be allowed now to shift his grounds of defense.

The order denying the motion for a new trial is reversed.

Gilfillan, C. J., absent on account of sickness, took no part.

GUARANTY—ASSIGNMENT OF.—A valid contract of guaranty indorsed upon a writing obligatory passes by assignment to the assignee, and vests in him a right of action in his own name: *Killian v. Ashley*, 24 Ark. 511; 91 Am. Dec. 519. A guaranty is not negotiable, and an action thereon can be maintained only in the name of the guarantor: *Ekel v. Snevily*, 3 Watts & S. 272; 38 Am. Dec. 758, and note. A guaranty is not negotiable when written under a negotiable instrument, but made payable to no person: *Smith v. Dickinson*, 6 Humph. 261; 44 Am. Dec. 306, and note. A contract of guaranty will be strictly construed, and, if made with one person or corporation, it cannot be extended to another: *Crane Co. v. Specht*, 39 Neb. 123; 42 Am. St. Rep. 562.

COLBY v. COLBY.

[59 MINNESOTA, 432.]

DIVORCE PROCURED BY FRAUD, RELIEF AGAINST.—

If a husband, for the purpose of fraudulently procuring a divorce from his wife, and of preventing her from defending any action he may bring, persuades her to go to a foreign country for the benefit of her health, and, while she is in that country, without funds with which to return, serves a summons on her in a suit for divorce, in which her impotency is alleged as a cause for divorce, and knowing her to be unacquainted with the meaning of the word "impotency," he writes to her by letter that the ground of the divorce is barrenness, and that such ground is sufficient to require the granting of divorce by the laws of the state, and he thereafter procures such divorce, upon her default, by fraudulently testifying that she had ever after her marriage been incapable of sexual intercourse, she is entitled to relief from such judgment of divorce, and it will be set aside in equity by the statutes of Minnesota.

JUDGMENT, RELIEF FROM.—WHILE PERJURY of the plaintiff in testifying falsely upon an issue disclosed by the complaint will not, of itself, entitle defendant to relief from a judgment procured thereby, if the facts testified to were not peculiarly or exclusively within the knowledge of the plaintiff, yet such perjury may be considered in connection with other circumstances tending to disclose a fraudulent scheme on the part of the defendant to put it out of the power of the plaintiff to defend the action, and as giving color to his prior acts, which are alleged to have been fraudulent.

Suit to set aside a decree of divorce. The statute (Gen. Stats. 1878, c. 66, sec. 285), referred to in the opinion of the court, declares that, in all cases where judgment has been or shall be obtained in any court of record by means of perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, an action may be brought by the party aggrieved to set aside the judgment at any time within three years after the discovery by him of the perjury, or of the other fraudulent act or practices upon which he relies.

Arctander & Arctander, for the respondent.

W. H. Adams, for the appellant.

⁴³³ CANTY, J. The defendant demurred to the complaint, on the ground that it did not state a cause of action, and this is an appeal by him from an order overruling the demurrer. The action is brought under the General Statutes of 1878, chapter 66, section 285, to set aside a judgment of divorce. The ⁴³⁴ complaint alleges that the parties were married in Denmark in 1879, and lived and cohabited together until May 4, 1892. That they then resided in Minneapolis, in this state. That for the purpose and with the intent of fraudulently procuring a divorce from her, and of preventing her from defending against the action for the same, he persuaded her to go back to Denmark to remain for a year or two, for the benefit of her health, and sent her to Denmark accordingly. That as a part of the same fraudulent scheme, and for the purpose of preventing her from returning to the state to defend such action, he failed to furnish her any funds whatsoever after September, 1892, and that she was then in Denmark, without friends, relatives, or any means. That he then commenced an action for divorce against her in Hennepin county, in this state, alleging impotency as the ground of divorce, and caused the summons and complaint to be served on her in Denmark on October 6, 1892. That on the copy there served on her was then written the following statement, signed by him: "In case of divorce being granted to me in this action, I agree to pay

and allow the defendant, Hedvig A. Colby, the sum of \$25 per month so long as she may need the same or remain single. C. M. Colby,"—but that nothing of the kind was ever attached to, or made a part of, the original papers. That he made this a part of the copies of the papers so served for the fraudulent purpose of inducing her to believe that such allowance would be made for her by the court, but that, in fact, he never procured, or intended to procure, any order or judgment for any such allowance. That at the time of the service of the papers on her, she was not acquainted with the meaning of the term "impotent," which he well knew, and he then fraudulently represented to her, by a letter written and sent to her, that the cause for which he was seeking such divorce was the barrenness of plaintiff, and no other cause. That she was thereby induced to believe that the fact that she was barren, and had borne no children to him, was a sufficient ground for divorce in Minnesota, and she was then far from any person who sufficiently understood the English language to inform her, or who could inform her, in any of these matters. That all of these fraudulent artifices, and some others alleged, were practiced with the intent, and for the purpose, of inducing her not to defend the divorce action, and, by reason of the same, she was induced not to defend against the same.

435 That on November 19, 1892, she being in default for want of an answer, he appeared before the district court, and, after being duly sworn, testified that she was, and ever since said marriage had been, impotent, and incapacitated for sexual intercourse. That all of said testimony was wholly false, as he then well knew, and that she never was impotent. That thereupon the court ordered judgment divorcing the parties, which judgment was entered on that day, and was obtained by said perjury and said fraudulent acts and practices.

That plaintiff arrived in this state May 4, 1894, three days before the commencement of this action, and then for the first time learned that said action for divorce was not on the ground of barrenness, and that no provision had been made for her support or maintenance by said judgment. That since September, 1892, he has contributed nothing to her support, except the sum of twenty-five dollars.

We are of the opinion that the complaint states a cause of action under said section 285. If she was sent away and left without means in a distant country for the purpose of preventing her from defending the divorce action intended to be commenced, and the other artifices alleged were practiced for the same

purpose, it is clearly a case where that statute will apply. By reason of the confidential relations of the parties, and the dependent position of the wife, the husband has opportunities for procuring judgment against her by fraud which are not possessed by one stranger as against another.

It was a year and seven months after the time the papers were served on her in the divorce suit before she commenced this action, and it is urged by appellant that she is guilty of laches in failing to act more promptly. Under all the circumstances of the case as alleged, we cannot so hold as a question of law. It does not very clearly appear from the allegations of the complaint that she was unable, during all of this time, to learn the true state of affairs, or return and act in the matter, yet it may fairly be implied from the allegations that such was the case—that her helpless and destitute condition continued.

It is further urged by appellant that the complaint does not state a cause of action on the ground of perjury, or show facts which entitle her to relief on that ground. We are of the same opinion. It was held in *Hass v. Billings*, 42 Minn. 63, that where ⁴³⁶ the pleadings disclose the fact to be proved so that the opposite party knows what the pleader will attempt to prove, and "is not under any necessity to depend on the other to prove the fact as he himself claims it," an action will not lie under the statute to set aside a judgment procured by perjury committed in proving such fact. We are of the opinion that the rule applies as well when the judgment is thus obtained when the defendant is in default as when he is not. In this divorce case, the complaint did disclose what the plaintiff would attempt to prove, and they were not facts peculiarly or exclusively within his knowledge. But the allegations of the complaint in the present case which aver that the charge of impotency and the evidence to prove it were both willfully false is still material, as throwing light on the alleged fraudulent scheme to put it out of her power to defend the action, as showing a motive for that scheme and the fraudulent practices in carrying it out, as tending to show his fraudulent intent in those practices, and as giving a coloring to his prior acts, all of which are matters to be considered on the trial of the action. The case of *Bomsta v. Johnson*, 38 Minn. 230, does not support the appellant's contention in any of these respects. These are all the points raised worthy of consideration.

The order appealed from is affirmed.

Gilfillan, C. J., absent on account of sickness, took no part.

JUDGMENTS PROCURED BY FRAUD OR PERJURY—RELIEF FROM.—Equity has jurisdiction to set aside a former judgment for fraud only in those cases where the perjury or fraud consists of extrinsic collateral acts, not examined and determined in the former action: *Friese v. Hummel*, 26 Or. 145; 46 Am. St. Rep. 610. This subject is fully discussed in the extended note to *Pico v. Cohn*, 25 Am. St. Rep. 165.

DIVORCE PROCURED BY FRAUD OR PERJURY—RELIEF FROM.—Courts have the same power over judgments in divorce suits as in other cases, and will vacate and set aside a decree that has been obtained by fraud or imposition: *Adams v. Adams*, 51 N. H. 398; 12 Am. Rep. 134; *Rush v. Rush*, 46 Iowa, 648; 26 Am. Rep. 179; *Wisdom v. Wisdom*, 24 Neb. 551; 8 Am. St. Rep. 215; *Brown v. Grove*, 116 Ind. 84; 9 Am. St. Rep. 823, and especially note. Where a man obtains a decree of divorce from his wife at a former term of court by false testimony, on a libel of which she had no actual notice, and knowledge of which he fraudulently kept from her, and of which the court had only apparent jurisdiction, founded on his false allegation of domicile, the court will vacate the same: *Edson v. Edson*, 108 Mass. 590; 11 Am. Rep. 393. See the discussion of this subject to be found in the extended note to *Greene v. Greene*, 61 Am. Dec. 459.

ESTES v. LOVERING SHOE COMPANY.

[59 MINNESOTA, 504.]

BANKS AND BANKING.—A check is within the provisions of the statute providing that, in actions upon promissory notes or bills of exchange by an indorsee, possession of the note or bill is prima facie evidence that it was indorsed by the person by whom it appears to be indorsed.

BANKS AND BANKING.—A CHECK IN THE POSSESSION OF A PARTY in a city distant from the bank upon which it is drawn, five or six days after its date, is not stale and overdue, so as to subject an indorsee in good faith and for value to an equitable defense existing in favor of the drawer.

Action against the defendant, a corporation, upon a check drawn by it on the Merchants' National Bank of St. Paul, in favor of A. J. Moore, of Boston, Massachusetts, and by him indorsed and delivered to the plaintiff in the action, in Denver, Colorado, some five or six days after its date. Moore procured this check by giving to the defendant his checks on a bank in Boston, which checks, upon being presented, proved to be worthless. At the trial, the checks were offered in evidence without proof of the genuineness of Moore's indorsement, and were, against the objections of the defendant, received. The jury was, by the court, instructed to return a verdict in plaintiff's favor. The defendant thereafter moved for a new trial, which being denied, he prosecuted this appeal.

William G. White, for the appellant.

Holcombe & O'Reilly, for the respondent.

⁵⁰⁷ COLLINS, J. Plaintiff's action was to recover the amount of two checks, drawn October 26, 1893, by defendant corporation, at its place of business in St. Paul, Minnesota, upon a local bank, and made payable to the order of one A. J. Moore. The latter, it was claimed, for value received, duly indorsed and delivered them to plaintiff, about five days after they were drawn, at his (plaintiff's) place of business in Denver, Colorado. Under the direction of the court below, a verdict was returned for plaintiff.

On two points the evidence was conclusive: 1. That the checks were obtained by Moore by means of false and fraudulent practices and representations, and without consideration; 2. That plaintiff, in good faith, received them from Moore, the payee, with his name already written upon the backs thereof, giving him in cash their ⁵⁰⁸ full face value. The checks, with the purported indorsements, were received in evidence over defendant's objection that no proof had been offered of the genuineness of the payee's signatures or purported indorsements.

Aside from any consideration of the fact that the payee personally presented these checks with his name already written upon the back of each, and thus obtained the amount thereof from plaintiff, we are of the opinion that a check comes within the purview of the General Statutes of 1878, chapter 73, section 89, which provides that, in actions brought on promissory notes or bills of exchange by the indorsee, possession of the note or bill is prima facie evidence that the same was indorsed by the person by whom it purports to be indorsed.

While in some respects checks differ from inland bills of exchange—and the differential qualities are pointed out in *Harrison v. Nicollet Nat. Bank*, 41 Minn. 488, 16 Am. St. Rep. 718—they are negotiable instruments much used, and growing in use, in business transactions, and possessing about all of the characteristics of inland bills. They have been defined as, in legal effect, inland bills of exchange drawn on bankers, and payable to a bearer (or order) on demand (Byles on Bills, 7th Am. ed., 1), and as bills with some peculiarities or a species of bills: 2 Daniel on Negotiable Instruments, 584. In view of the close relationship between these instruments, and the fact that the statutory rule should be the same in actions brought on bills of exchange, strictly speaking, and checks, we think that the latter are covered by the statute under consideration.

It is argued by counsel for appellant that these checks were stale and overdue when transferred to the plaintiff, and are, therefore, subject to any equitable defense which might have been available so long as they remained in the hands of the payee; but the decided weight of authority is opposed to this claim. It is to be borne in mind that no question as to the discharge of an indorser by delay in presentation, or by the failure of the bank meantime on which the checks were drawn, arises here, but the attack is made by the maker solely upon the consideration. As before stated, the checks were drawn and dated October 26th, at St. Paul, and were cashed about five days later (six days at most) in Denver, Colorado, and there were no circumstances, except the period of time which had ⁵⁰⁹ passed, and the fact that the payee was attempting to cash the checks at a point some distance from the city in which they were drawn, to put plaintiff on his guard.

In these days of large business enterprises and extraordinary facilities for traveling, there was nothing suspicious in the fact that the checks were presented at a city distant from that in which they were drawn and made payable; and, as to the time, the rule is well settled, that a holder who, in good faith and for value, takes a check several days after it is drawn, receives it without being subject to defenses of which he had no notice before or at the time his title accrues: *Morse on Banks and Banking*, sec. 442, and cases cited. In one of these cases (*Rothschild v. Corney*, 9 Barn. & C. 389), the check in dispute was taken six days after date. In another (*Ames v. Meriam*, 98 Mass. 294), ten days had elapsed. These views dispose of the appeal.

Order affirmed.

CHECKS—LAW GOVERNING.—A bank check is much the same as an inland bill of exchange, and is governed generally by the law applicable to such bills and to promissory notes: *Barnet v. Smith*, 30 N. H. 256; 64 Am. Dec. 290, and note; *Bickford v. First Nat. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Barbour v. Bayon*, 5 La. Ann. 304; 52 Am. Dec. 593; *Smith v. Jones*, 20 Wend. 192; 32 Am. Dec. 527.

CHECKS—PRESENTMENT.—A bank check should be presented for payment within a reasonable time. Otherwise, the delay is at the peril of the payee: *Industrial Trust etc. Co. v. Weakley*, 103 Ala. 458; 49 Am. St. Rep. 45, and note. The general rule of diligence as to the presentation of a check received in a place distant from that of the bank upon which it is drawn is, that the check must be forwarded to the latter place on the next secular day after its receipt, and be presented for payment on the day after it has reached such place by due course of mail: *Gifford v. Hardell*, 88 Wis. 538; 43 Am. St. Rep. 926, and note.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

MEADOWS v. PACIFIC MUTUAL LIFE INSURANCE CO.

[129 MISSOURI, 76.]

INSURANCE—ACCIDENT—BURDEN OF PROOF.—Under a policy insuring against death from such violent and accidental injuries as shall externally be visible on the body, and which alone cause death, evidence that the insured was found dead and mangled on a railroad track, establishes a prima facie case, and casts the burden of proof upon the insurer to show that death resulted from a violation of some of the conditions in the policy specially pleaded in defense.

INSURANCE — ACCIDENT — PRESUMPTION.—A person whose death is caused by injury is presumed to have been in the exercise of ordinary care at the time of his death. This presumption is not rebutted by the unexplained fact that his body was found mangled upon a railroad track.

ALTHOUGH INSTRUCTIONS GIVEN FOR PLAINTIFF IGNORE facts tending to establish the defense, the defendant cannot complain, if the theory of the defense is fully explained in instructions given at his request.

INSURANCE — ACCIDENT — ROADBED.—A space between railroad tracks, constituting a well-beaten, level, and smooth walk is not a part of the roadbed, within the meaning of an accident insurance policy, not insuring against accidents "on a railroad bridge, trestle, or roadbed."

Dowe, Johnson & Rusk, for the appellant.

J. J. Porter and B. J. Woodson, for the respondent.

¶ **GANTT, P. J.** This is an action on an accident insurance policy by the administrator of the assured, Daniel A. Meadows, deceased, for five thousand dollars. The petition contains the usual averments, and alleges that said Daniel A. Meadows lost

his life, on or about July 30, 1892, by being "accidentally run upon and over by a car, or train of cars, on the track of the Hannibal & St. Joseph Railroad Company, at the city of Chillicothe, in the state of Missouri," and prayed judgment for the sum assured.

The answer is a general denial and a plea of the following conditions in the policy, to wit: "The claimant shall establish affirmatively, under any claim or proceeding thereunder, that the injury or death resulted from actual accident, according to the policy." And further: "The insured agrees to use due diligence for personal safety and protection; and this insurance does not cover, and the company will not be liable for, injury nor death while engaged in, caused by, resulting from, or attributable, partially or wholly, to any of the following causes: Voluntary exposure to unnecessary danger or perilous venture, violating law or the rules of any company or corporation, intentional injuries inflicted by the insured or any other person, or entering, or trying to enter or ⁸¹ leave, any moving conveyance propelled by steam power, or riding in or upon any such conveyance not provided for the transportation of passengers, or being upon a railroad bridge, trestle, or roadbed."

The answer pleaded that the deceased was acting in violation of said conditions at the time of the accident, and that his death occurred by reason of such violation, and by reason of voluntary exposure to unnecessary danger, and by reason of being upon the roadbed of the Hannibal & St. Joseph railroad at Chillicothe, Missouri.

The policy contained the conditions pleaded in the answer, and a great number of other conditions exempting the company from liability for accidents of almost every conceivable character. Indeed, it is somewhat difficult to name an accident, as society is now constituted, for which defendant would be liable, if a strict technical construction is indulged as to each of these conditions. The sixth clause of the conditions indorsed upon the policy is as follows:

"6. This insurance does not cover, and the company will not be liable for, disappearances, nor injury (nor death resulting from the same) of which there is no visible mark upon the body of the insured, the body itself, in case of death, not being considered such mark produced at the time of and by the accident; nor injury nor death while engaged in, caused by, resulting from, or attributable, partially or wholly, to any of the following causes: Disease or bodily infirmity, or act committed by the insured while under mental aberration produced by disease or bodily infirmity, fits, vertigo, hernia, sleep walking, intoxication, use of narcotics

or anesthetics, medical or surgical treatment (amputation rendered necessary by the injury, and made within ninety days, excepted), sunstroke, freezing, taking of poison, contact with poisonous substances, ^{ss} inhalation of gas or vapor (voluntary or otherwise), war or riot, quarreling or dueling, fighting, wrestling, racing, excessive lifting, voluntary overexertion, gymnastic sports (except for amusement), suicide (sane or insane), any vicious act, voluntary exposure to unnecessary danger or perilous venture (unless in the humane effort to save human life), violating law or the rules of any company or corporation, intentional injuries inflicted by the insured or any other person (except as hereinafter otherwise provided), or entering, or trying to enter or leave, any moving conveyance propelled by steam power (except cable or electric cars), or riding in or upon any such conveyance not provided for the transportation of passengers, or being upon a railroad bridge, trestle, or roadbed (railroad officers and employees while engaged in their prescribed duties as such excepted)."

There was a reply denying that deceased had broken any condition of the policy. Plaintiff obtained judgment, and defendant appeals. The facts are as follows:

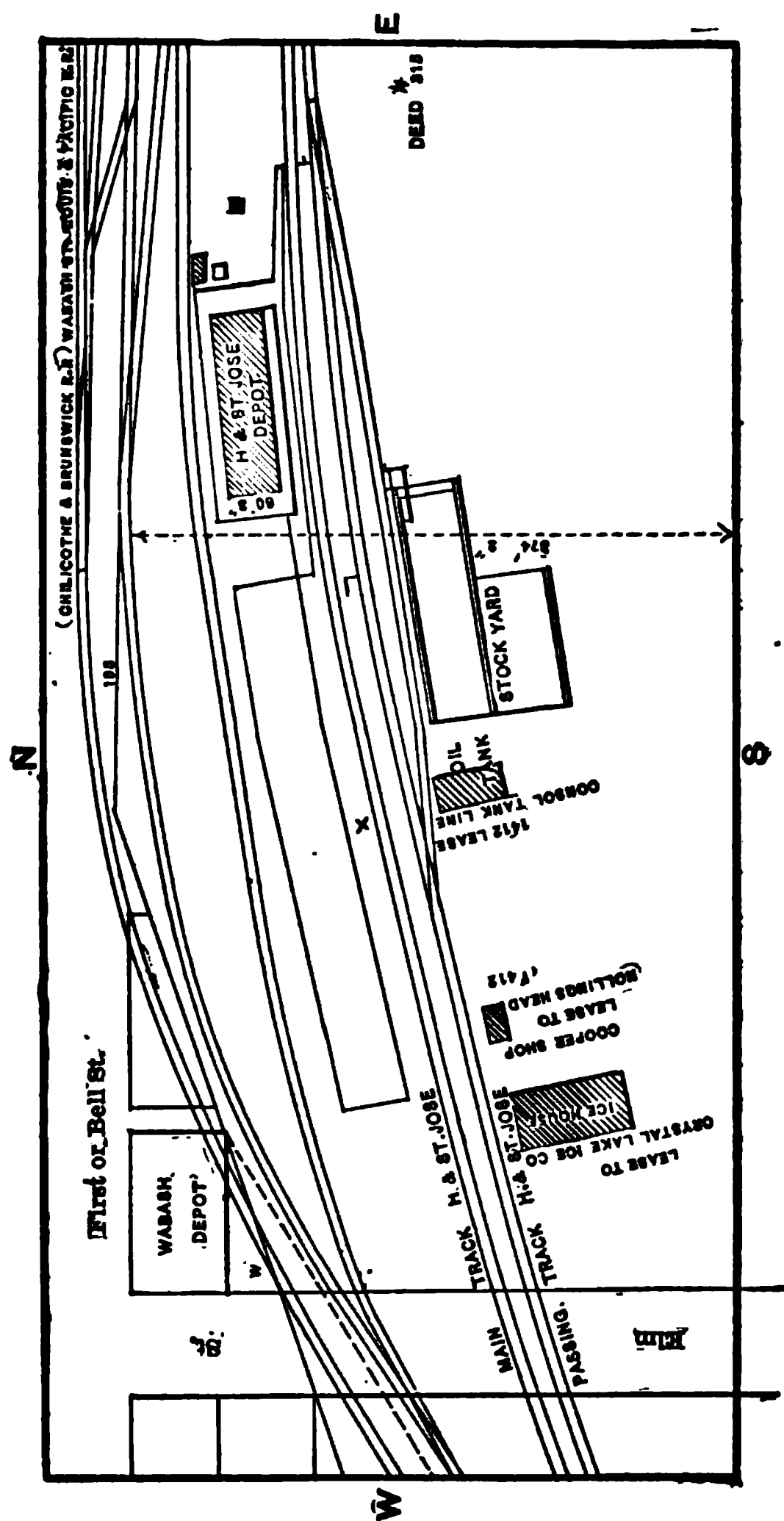
It was admitted at the trial that plaintiff was the qualified and acting administrator of the estate of Daniel Meadows; that notice of his death was given, and that due proof was furnished, as required by the policy.

Daniel Meadows, at the time of his death, was a stockman, fifty-nine years old, engaged in buying and selling mules. On the night of his death, he went on the Wabash railroad from Gallatin to Chillicothe. At Gallatin he and witness Noll had a conversation. He said he lived in St. Joseph, and seemed very anxious to get home, and, on being asked what he was going to Chillicothe for, when he could take the Rock Island road for home, said he could go to Chillicothe and catch a train there almost any time, and he could not ^{ss} on the Rock Island. At Chillicothe about 1 A. M. that night, he talked with John Fitzpatrick, the night telegraph operator, at the window at the Wabash depot, for a few minutes, and inquired when he could get a train for St. Joseph, and was told he could get a passenger train at 4:20 A. M. On being told that there was a freight train there, but it would not carry passengers, he said: "I am a stockman, and they all know me. I am a stockman, and they will carry me." He then left and went west from the depot to Elm street, thence south on Elm street. At this time an eastbound freight train was standing on the north track of the Hannibal & St.

Joseph railroad, east of Elm street, and a westbound train on the sidetrack.

Ten or fifteen minutes afterward, the night operator, with whom he had been talking, heard a yell, as if from someone in distress, and at the same time heard a train moving. It was a very dark night. Both the east and west bound freights were there in the yards, the eastbound train being on the north and main track. About eight car lengths east of where the caboose of that eastbound freight stood that night, and about opposite the usual place for the westbound freight to stand on the sidetrack, the body was afterward found, about 2 A. M., cut in two, the lower part between the rails of the main track, and the upper part between the passing track and the main track. The body was cut diagonally across. The body was first found by John Slaughter, a brakeman on the westbound freight train. That train pulled into the yards and stopped with its engine at the tank, fifteen or twenty yards west of the Hannibal depot, to take water, and then pulled in on the passing track to wait for the eastbound train to pull out. The two trains were not on the tracks together for any length of time. After the eastbound train had gone, Slaughter started ⁸⁴ ahead to change the switch, and found the legs of the body between the rails of the north track, and the upper part of the body just south of the south rail of that track. Slaughter touched the face of the body, and found it not yet cold.

Two eastbound freights passed through Chillicothe that night. The first one met the westbound freight ten miles east of Chillicothe; it stopped at Chillicothe about five minutes, did no switching; it pulled in slowly with the headlight burning; the engineer could have seen a man, or the body of a man, on the track, but saw nothing of the kind. He examined the wheels of his engine at Brookfield, when he heard of the accident, and saw no indications of having run over a man. The other east going freight had between fourteen and nineteen cars; it did no switching there. The engine stopped for ten or fifteen minutes at the tank, ten or fifteen feet east of the depot, which left the hind end of the train just east, or a car length or two east, of Elm street. At the rate at which it ran in, the engine, in the opinion of the engineer, would have thrown a man from the track. The headlight was burning, and the electric light was burning. The engineer could have seen a man, or the body of a man, on the track in front of his engine, if one had been there, but he saw nothing of the kind.



An examination of the accompanying plat will aid in understanding the situation at the place of the accident. Elm street, where Mr. Meadows was last seen alive, runs north and south across the railroad tracks just west of the Wabash depot. The tank at which the eastbound engine was then taking water is indicated by a T shaped mark between the Hannibal tracks, just east of the Hannibal depot. The distance from the Hannibal depot to Elm street is about two hundred yards. The distance ⁸⁶ between the two Hannibal tracks is ten feet. The body was found at the place of the cross-mark, opposite the oil tank. This was about midway of the parallelogram indicating a park, spoken of in the testimony. An electric arc light hangs north of the Hannibal tracks, just west of the Hannibal depot. There is an even grade between the Hannibal and Wabash depots. Between the main track and the passing track there is a uniform space of ten feet, the condition of the ground just the same as on the north side of the main track, filled with fine cinders and beaten down.

Witness Darby says the ground from Elm street east between the track is smooth and level. The undisputed evidence is, that the rear end of the eastbound train on the main track was a considerable distance east of Elm street. There was no witness to the accident.

The theory of the defendant, as shown by its second instruction, is, that, after leaving the Wabash depot, Meadows went east on the north side of the main track of the road, upon which the eastbound train was standing, and attempted to pass between two of the cars of that train, intending by that way to reach the westbound train on the south or passing track; or he walked along the south side, and was caught by the cars and killed; and, in support of the theory, relies upon the evidence that the trunk of the remains was found between the main and side tracks, and the legs between the rails of the main track, and the evidence of Fitzpatrick as to Meadows' purpose to take the westbound train to St. Joseph. Whereas, plaintiff insists this theory is met by the facts that Meadows was familiar with the depot grounds; that he knew the smooth, beaten ground ten feet wide between the main and the passing tracks; that the eastbound train on the main track was standing east of Elm street, on which he ⁸⁷ passed from the Wabash depot to the Hannibal tracks; the improbability of his spending ten or fifteen minutes going so short a distance as that between the Wabash depot and the point where he was supposed to have been struck, and the extreme difficulty of believing that a rational man would be guilty of the incredible folly of standing on Elm street, where he could look

east over a familiar, level, unobstructed way to the train he wanted to reach, and deliberately choosing a way he knew would involve the difficulty and peril of passing between the cars of a train standing on the main track.

The court gave the following instructions for plaintiff:

"1. The jury are instructed if defendant issued to Daniel A. Meadows the policy read in evidence, and if they believe from the evidence that said Daniel A. Meadows, on and about the thirtieth day of July, 1892, was accidentally run upon and over by a car or train of cars on the track of the Hannibal & St. Joseph railroad at Chillicothe, Missouri, whereby he sustained such violent and accidental injuries as to be externally visible upon his person, and which injuries, independent of all other causes, occasioned his death within ninety days from the happening of such accident; that plaintiff gave defendant immediate notice in writing, with full particulars, of the accident and furnished defendant with affirmative proof of the death of said Meadows within seven months of the date thereof; then the finding should be for the plaintiff.

"2. The term 'roadbed' of a railroad means that part of the railroad company's right of way which is occupied by the ties and rails constituting the railroad track, and not the entire space included in such right of way, and in this case the ten feet of space mentioned in evidence between the tracks of the Hannibal & St. Joseph railroad, mentioned in evidence, is not a part ^{ss} of the roadbed of said railroad within the meaning of the condition of the policy read in evidence.

"3. In absence of proof to the contrary, the law presumes that Daniel A. Meadows was, at the time of his death, exercising proper care for his safety."

For the defendant the court gave the following instructions:

"1. The court instructs the jury that, under the terms of the policy sued upon, Daniel A. Meadows, deceased, was required to use due diligence for his personal safety and protection, and was prohibited from voluntarily exposing himself to unnecessary danger or perilous venture. By the term 'due diligence,' as used in this instruction, is meant the exercise of such care and caution as an ordinarily prudent man would use under similar circumstances; and by the term, 'voluntarily exposing himself to unnecessary danger or perilous venture,' is meant the intentional doing of some act which reason and ordinary prudence would pronounce dangerous. And if you believe from the evidence that the deceased, Daniel A. Meadows, was killed because of his failure to use due diligence for his personal safety and protection, and be-

cause of his voluntary exposure to unnecessary danger or perilous venture, as these terms are defined in these instructions, your verdict must be for the defendant.

"2. The jury are instructed that if they believe from the evidence that Daniel A. Meadows, deceased, at the time he met his death, was voluntarily exposing himself to unnecessary danger, they will find for the defendant.

"And the court further instructs the jury that an attempt to pass between two of the cars of a train upon the track of the Hannibal & St. Joseph railroad, at Chillicothe, Missouri, at night, the train having the engine attached and being in condition to run, would ⁸⁹ constitute voluntary exposure within the meaning of this instruction.

"3. The court instructs the jury that if they believe from the evidence that Daniel A. Meadows was killed while being upon, or attempting to board, a train not provided by the railroad for the transportation of passengers, your verdict must be for the defendant.

"4. The court instructs the jury that if you believe from the evidence that Daniel A. Meadows was killed while in the act of walking along, or being upon, the roadbed of the Hannibal & St. Joseph railroad, at Chillicothe, Missouri, your verdict must be for the defendant.

"5. The court instructs the jury that, in determining the question as to whether or not Daniel A. Meadows was chargeable with negligence, the jury must take into consideration all the facts and circumstances that were given in the case."

1. Before proceeding to certain specific exceptions discussed by counsel, it seems best to determine where the burden lies in this case.

The policy declared on insures Daniel A. Meadows in the sum of five thousand dollars for the term of twelve months, commencing at 12 o'clock noon, on the eleventh day of July, 1892. Said sum to be paid to his legal representatives (if he be dead), "after due notice and satisfactory proof that the insured has, during the continuance of this policy, sustained such violent and accidental injuries as shall externally be visible upon his person, and which, independently of all causes, shall have occasioned death within ninety days from the time of the happening of such accident," upon certain conditions indorsed upon the back thereof. Other conditions were indorsed upon the back of said policy, among them the two following:

⁹⁰ "The claimant shall establish affirmatively, under any claim or proceeding thereunder, that the injury or death resulted

from actual accident according to the policy." And further: "The insured agrees to use due diligence for personal safety and protection; and this insurance does not cover, and the company will not be liable for, injury nor death while engaged in, caused by, resulting from, or attributable, partially or wholly, to any of the following causes: Voluntary exposure to unnecessary danger or perilous venture, violating law or the rules of any company or corporation, intentional injuries inflicted by the insured or any other person, or entering, or trying to enter or leave, any moving conveyance propelled by steam power, or riding in or upon any such conveyance not provided for the transportation of passengers, or being upon a railroad bridge, trestle, or roadbed."

The primary question is, What amount of proof is necessary to establish a *prima facie* case for plaintiff? In short, must he not only establish that the death of the assured was caused by "such violent and accidental injuries as shall externally be visible upon his person, and, independently of all other causes, occasioned his death within ninety days from the happening thereof," but must he also prove that his intestate's death was not caused by his violation of some one or more of the vast number of conditions and executory stipulations as to his future conduct indorsed upon said policy?

The general rule of pleading upon a contract which contains conditions, exceptions, or provisos is thus stated by the supreme judicial court of Massachusetts in *Commonwealth v. Hart*, 11 Cush. 130: "If such instrument contain in it, first, a general clause, and afterward a separate and distinct clause which has the effect of taking out of the general clause something that would otherwise be included in it, a party, relying upon the ⁹¹ general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it, together with the exception."

And the pleader is only required to state the substantive facts which he is bound to prove: *Gould on Pleading*, c. 4, secs. 20, 21; *Vavasour v. Ormrod*, 9 Dowl. & R. 597; 6 Barn. & C. 430; 2 *Saunders on Pleading and Evidence*, 2d ed., 1025, 1026.

It has been ruled by the supreme court of the United States in *Piedmont etc. Ins. Co. v. Ewing*, 92 U. S. 377, that in actions upon policies containing many provisos and conditions, the courts will require the insurance company to prove the want of compliance with any particular proviso or condition upon which it relies, and this has been generally held as to the condition, usually

incorporated in life insurance policies, that the policy shall be invalid if the assured shall commit suicide, the burden in such cases being cast upon the company to aver and prove the breach of that condition: *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144; 93 Am. Dec. 73; *Campbell v. New England etc. Ins. Co.*, 98 Mass. 381; *Redman v. Aetna Ins. Co.*, 49 Wis. 431; *Grangers' Life Ins. Co. v. Brown*, 57 Miss. 308; 34 Am. Rep. 446.

We think that the plaintiff here was only required to prove that the death of Daniel Meadows was caused by violent and accidental injuries, visible upon his person, and that due notice of his death and proof of loss were made within the time required by the policy, and that defendant had the burden of proving that his death was caused by one of the conditions by it specially pleaded. But for the stipulation in the policy, the negligence of the deceased would have constituted no defense whatever to the action. A fair construction of it simply permits a plea of contributory negligence, and ⁹² the burden of sustaining that plea is upon the defendant who asserts it: *Home etc. Assn. v. Sargent*, 142 U. S. 691; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; *Anthony v. Mercantile etc. Assn.*, 162 Mass. 354; 44 Am. St. Rep. 367; *Badenfield v. Massachusetts etc. Assn.*, 154 Mass. 77; *Goldschmidt v. Mutual Life Ins. Co.*, 102 N. Y. 486.

The plaintiff averred that all the conditions of the policy had been observed by his intestate. We think that the burden of establishing a violation of the executory stipulations, that Mr. Meadows should use due diligence for his personal safety and would not voluntarily expose himself to danger by going upon the roadbed of a railroad, properly devolved upon defendant, and shall so treat it in the further disposition of the cause.

The importance of settling the question of the burden of proof becomes at once apparent when we come to consider the decisive question in the case, the action of the circuit court in overruling the demurrer to the evidence.

Defendant urges that every reasonable inference or rational conjecture tends to show that Meadows was attempting to pass between the cars of the eastbound train of the Hannibal & St. Joseph railroad, and thereby lost his life; that in so doing he was violating his agreement with defendant, by voluntarily exposing himself to unnecessary danger and by being upon said roadbed.

But much of this is speculation. The plaintiff showed beyond controversy that Daniel Meadows died of violent injuries, which were plainly visible upon his body; that the nature of these injuries left no doubt that they were the sole cause of his death, and proper proofs were made. Here he rested. He had made a

prima facie case, unless we are required to presume that, because he was killed by being run over by cars on a ⁹³ railroad track, he was voluntarily exposing himself to unnecessary dangers, and was violating his agreement in regard to being upon a roadbed of a railroad, within the meaning of the policy.

Such a presumption would destroy the presumption indulged by the law, that Meadows was at the time exercising proper care for his safety. In the absence of all evidence to the contrary, the law presumes that he was exercising due care for his protection. There is not a word of evidence tending to show he was intoxicated, or that he was robbed and murdered. He was a man of the full age of discretion and of business habits. Under such circumstances, the language of Judge Agnew in *Allen v. Willard*, 57 Pa. St. 374, is very pertinent. He says: "The natural instinct which leads men in their sober senses to avoid injury and preserve life is an element of evidence. In all questions touching the conduct of men, motives, feeling, and natural instincts are allowed to have their weight, and to constitute evidence for the consideration of courts and juries."

And this court, in *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503, said: "Now, the law presumes that the deceased was in the exercise of ordinary care; and this presumption is not overthrown by the mere fact of injury": Citing: *Shearman and Redfield on Negligence*, sec. 44; *Hoyt v. Hudson*, 41 Wis. 105; 22 Am. Rep. 714; *Gay v. Winter*, 34 Cal. 153.

And in *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 294, this court again said: "There is no contributory negligence in the case, so far as the evidence in the record goes; it can only be found by indulging in unwarranted presumptions. The only presumption the law indulges in respect thereof is, that the deceased was in the exercise of ordinary care and diligence at all times in the discharge of his duties, until the contrary appears. . . . It was not ⁹⁴ incumbent upon the plaintiff, in the first place, to prove that the deceased was in the exercise of ordinary care and prudence": *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219; 39 Am. Rep. 503; *Huckshold v. St. Louis etc. Ry. Co.*, 90 Mo. 548; *Crumpley v. Hannibal etc. R. R. Co.*, 111 Mo. 152.

And in the absence of all the evidence of how he came to be thrown under the train which killed him, the presumption is, that it was the result of accident: *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; *Lancaster v. Washington Life Ins. Co.*, 62 Mo. 121.

It follows that, by invoking these presumptions, plaintiff not only established a death by violence, but that he was in the exer-

cise of ordinary care and prudence when he met his death, and that it was caused by accident.

Nor is this presumption rebutted by the unexplained fact that his body was found mangled upon a railroad track. There were many purposes for which he might lawfully go upon or across the railroad track.

In *Badenfeld v. Massachusetts etc. Assn.*, 154 Mass. 77, a case strikingly similar to this, the trial court was asked to rule, upon the undisputed evidence, that the defense of want of due diligence, or of voluntary exposure to unnecessary danger by the deceased, was made out, and to instruct the jury to find for defendant, which was refused and assigned as error. We can do no better than to adopt the reasoning of the supreme court of Massachusetts in that case:

"There was no evidence of the cause of his fall, and it cannot be contended that the mere fact that he fell under the car is a defense. The real contention of the defendant, expressed in different forms in its prayers for instructions, is that the mere fact that the deceased was in a dangerous place (on the platform east of the track), or, as stated in one prayer for instructions, doing a dangerous act (leaving a car while it was in ⁹⁵ motion), is, as matter of law, conclusive proof that he did not use all due diligence for personal safety and protection, and that he voluntarily exposed himself to unnecessary danger. This is not an action against the railroad company, in which the mutual rights and duties of a person injured and the company are involved. As regards the defendant, the deceased had a right to go upon the platform, and to examine the wall of the building and the girders, and the platform, and the car standing upon the track, and to enter and leave them. None of these acts would, of itself, be evidence of want of due diligence for personal safety, or of voluntary exposure to unnecessary danger. Any of them might be done carefully or carelessly. The manner and circumstances of the act would give character to it. The facts that the deceased was upon the platform, and that he was injured in the manner shown, clearly do not constitute negligence in law, or afford conclusive evidence of negligence.

"The defendant asked for instructions upon the hypothesis that the deceased fell while leaving the car when it was in motion. There was no evidence that he so fell, but, if it could be inferred, it would not be conclusive of his negligence. That would depend upon the circumstances, and there would be no presumption that the circumstances were such as to make it negligent. If the jury could surmise that he left the car when it

was in motion under circumstances which rendered the act negligent, they could equally well surmise that he left it under circumstances which would show that the act was not negligent. . . . If the jury infer an act, they are not, without evidence, at liberty to infer the circumstances which made the act negligent. The jury could not properly base their verdict upon particular facts found without evidence. The real question was, whether the facts directly proved ⁹⁶ by the evidence, and those to be inferred from them, sustained the burden of proof which was upon the defendant, and this was clearly a question for the jury, and not for the court, unless the court could rule that there was not sufficient evidence."

In *Anthony v. Mercantile etc. Assn.*, 162 Mass. 354, 44 Am. St. Rep. 367, a passenger in good health, on a train for Denver, was found unconscious upon the ground between the platform and the nearest rail of the track at Granite station as the train was moving out of the station. His legs were crushed, and he died in four hours. In addition to a clause providing that he should not voluntarily expose himself to unnecessary dangers or hazards was the following: "Standing, riding, or being upon the platforms of moving railway coaches, other than street-cars, or riding in any other place not provided for the transportation of passengers, or entering, or attempting to enter or leave, any public conveyance using steam as motive power while the same is in motion, . . . are hazards not contemplated or covered by this certificate." It was insisted: 1. That the burden was on plaintiff to show that his intestate's death was not caused by a violation of the clause last cited; and 2. That the court should have taken the case from the jury. But the supreme court of Massachusetts again held that: 1. Under the general rule of pleading, plaintiff was not required to allege or prove that the death was not caused by a violation of one of the conditions to which the insurance did not apply; and 2. That the court properly overruled the demurrer to the evidence; that while the circumstances pointed strongly to the inference that the deceased was "standing, riding, or being" on the platform of the moving cars, yet, as a matter of law, a jury was not bound to find that fact.

⁹⁷ No error was committed in overruling the demurrer to the evidence. The circuit court could not say, as a matter of law, that defendant had affirmatively established its defense.

2. This brings us, then, to a consideration of the instructions.

The criticism of the plaintiff's first instruction is, that it ignores the essential facts in the case, to wit, the facts tending to establish the defense. If this instruction stood alone, and the

theory of the defense had not been strongly and clearly brought out by defendant's instructions, defendant would have had just cause of complaint, but when all the instructions are read together, as they must be, it will be found there was no error: *Owens v. Kansas City etc. R. R. Co.*, 95 Mo. 169; 6 Am. St. Rep. 39; *First Nat. Bank v. Hatch*, 98 Mo. 376; *Spillane v. Missouri Pac. Ry. Co.*, 111 Mo. 564.

Nor was there any conflict between plaintiff's first and defendant's fourth. They were simply predicated upon different hypothetical views of the evidence.

3. Finally, it is insisted the court erred in defining "roadbed" in plaintiff's second instruction. As already stated, that instruction is in these words: "2. The term 'roadbed' of a railroad means that part of the railroad company's right of way which is occupied by the ties and rails constituting the railroad track, and not the entire space included in such right of way, and in this case the ten feet of space mentioned in evidence between the tracks of the Hannibal & St. Joseph railroad, mentioned in evidence, is not a part of the roadbed of said railroad, within the meaning of the condition of the policy read in evidence."

We are cited by counsel to the lexicographers for the definition of "roadbed," and to cases defining roadbeds for the purpose of taxation, but it seems to us these cases are not applicable here. The case of *Piper* ⁹⁸ v. *Mercantile etc. Assn.*, 161 Mass. 589, is pertinent, but we think is distinguishable from the case at bar in the facts.

There the evidence disclosed, beyond controversy, that the deceased was walking longitudinally on the roadbed between the tracks of the railroad in front of the engine, and was struck and killed. The chief justice said: "The place where he was walking was not fitted up as a way; it was a part of the roadbed, and nothing more. That many people used it . . . is immaterial."

In this case, the evidence shows that the space between the main line of the Hannibal & St. Joseph railroad and the park was a well-beaten, level, and smooth walk, made of fine cinders beaten down, and the space between the main, or north, track and the passing track was of the uniform width of ten feet and of the same material as the walk between the park and the main track. Unlike the track in *Piper v. Mercantile etc. Assn.*, 161 Mass. 589, the evidence showed it had been made smooth to walk on, and the most prudent person would not have hesitated to have walked along said space, because there would be no danger from passing trains.

A reasonable and fair construction of these words was contained in the court's instruction. It would be most unreasonable to hold that, merely because this space was a portion of the right of way, one seeking passage on the trains of the company, or called there on business to meet a relative or friend, on business or in the discharge of a social duty, should be charged with want of care for his welfare. There was ample space upon a well-worn and smoothly trodden path, and the court committed no error in declaring this space not a part of the roadbed: *Follis v. Pacific Mut. etc. Assn.* (Iowa, April 8, 1895), 62 N. W. Rep. 807; *Standard Life etc. Ins. Co. v. Langston*, 60 Ark. 381.

The judgment is affirmed.

Burgess and Sherwood, JJ., concur.

Accident Insurance; Evidence of Cause of Death.

Burden of Proof.—Under a policy of insurance agreeing to pay a specific sum on proof of the death of the insured from bodily injuries effected through external, violent, or accidental means, provided, always, the death shall not have been produced by any of the various acts enumerated in the policy, it devolves upon the plaintiff to establish that the death of the insured was caused by external, violent, and accidental means. He thus makes out a prima facie case entitling him to recover. To prevent such recovery, the burden of proof is upon the insurer to show that the death arose from one of the excepted causes enumerated in the policy: *Anthony v. Mercantile etc. Assn.*, 162 Mass. 354; 44 Am. St. Rep. 367; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116; 17 Am. St. Rep. 184; *Coburn v. Travelers' Ins. Co.*, 145 Mass. 227; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Home Ben. Assn. v. Sargent*, 142 U. S. 691.

The Death of the Insured is Never Presumed to have been Self-inflicted, nor to have been caused by his negligence. On the contrary, the death is presumed to have been the result of an accident, and the burden of proof is upon the insurer to rebut this presumption. Thus, upon proof being made to the effect that the decedent, who was insured against death by accident, appeared at his home with marks of extreme violence visible upon his back, which seemed to have been inflicted recently, and from which he subsequently died, it is presumed that such injuries were not self-inflicted, and were not caused by the negligence of the insured, but that they were the result of accident. The insurer, to escape liability, must assume the burden of proving that the death resulted from some cause against which he did not insure, or that there has been a breach of some agreement or condition in the policy on account of which he is relieved from liability: *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116; 17 Am. St. Rep. 184.

In an action upon a policy insuring against bodily injuries, "effected through external, violent, and accidental means, within the meaning of this contract and the conditions hereunto annexed," one of which is, that "the party insured is required to use all due diligence for personal safety and protection," the burden of proof is on the insurer to show that the assured did not use such due diligence: *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572. Under a certificate of membership in an accident association, containing a provision that "members are required to use all due diligence for personal safety and protection," and that no claim shall be made under the certificate when death or injury may

have happened in consequence of any voluntary exposure to unnecessary danger," the burden of proof is on the insurer to show that the insured did not use such diligence, or that he did thus expose himself to such danger: *Badenfeld v. Massachusetts etc. Assn.*, 154 Mass. 77; *Neill v. Travelers' Ins. Co.*, 7 Ont. App. 570.

Suicide.—Under policies of life or accident insurance, where the death of the insured has occurred, and there is no evidence of the cause, the presumption always arises, that the death was the result of natural or accidental causes, and not an act of self-destruction: *Guardian etc. Life Ins. Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180; *Insurance Co. v. Bennett*, 90 Tenn. 256; 25 Am. St. Rep. 685; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410. If such policies provide that the insurer shall not be liable in case of the death of the assured by his own hand, the plaintiff need only prove the death of the insured, and the insurer who sets up the cause of death as suicide then has the burden of proof to show that the injuries which caused the death were intentional on the part of the insured: *Walcott v. Metropolitan Life Ins. Co.*, 64 Vt. 221; 33 Am. St. Rep. 923; *Stormont v. Waterloo etc. Assur. Co.*, 1 Fost. & F. 22; *Phillips v. Louisiana etc. Life Ins. Co.*, 26 La. Ann. 404; 21 Am. Rep. 549; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Hancock etc. Life Ins. Co. v. Moore*, 34 Mich. 41; *Continental Ins. Co. v. Delpeuch*, 82 Pa. St. 225; *Schultz v. Insurance Co.*, 40 Ohio St. 217; 48 Am. Rep. 676; *Goldschmidt v. Mutual Life Ins. Co.*, 102 N. Y. 486; *Wright v. Sun Mut. Life Ins. Co.*, 29 U. O. C. P. 221.

Nothing appearing to the contrary, the legal presumption is, that a man died from a natural cause, and not from an act of self-destruction. The mere fact of death in an unknown manner creates no presumption of suicide, nor does the finding of a coroner's jury, that the cause of death was insanity, tend to prove the commission of suicide; and, if recovery upon a policy of insurance is resisted, on the ground that the insured committed suicide, the defendant must satisfy the jury, by a preponderance of the evidence, that the injuries causing death were intentionally inflicted by the assured: *Walcott v. Metropolitan Life Ins. Co.*, 64 Vt. 221; 33 Am. St. Rep. 923. The mere fact of death in an unknown manner, and that the body is found without marks of violence upon it, does not create a legal presumption of self-destruction, and the insurer, alleging suicide, must prove it: *Continental Ins. Co. v. Delpeuch*, 82 Pa. St. 225. Under a policy stipulating against liability if the assured shall commit suicide, whether sane or insane, if the evidence is conflicting, and quite evenly balanced as to whether the death was caused by the intentional or accidental act of the deceased, it is to be presumed that death resulted from accident: *Ingersoll v. Knights of Golden Rule*, 47 Fed. Rep. 272; *Guardian etc. Life Ins. Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180. If there is any doubt, arising from the evidence, whether the death of the insured was the result of accident or of suicide, the doubt should be resolved in favor of the legal presumption that it was the result of an accident: *Keels v. Mutual etc. Life Assn.*, 29 Fed. Rep. 198. If the policy provides that, "in case the insured shall die by his own hands, this policy shall be null and void, except that, in case he shall die by his own hands while insane," the amount to be paid shall be the amount of premium actually paid, with interest, the mere fact that the insured was insane when he took his life is not sufficient to defeat a full recovery of the amount of the policy. To defeat such recovery, the defendant must show that the insured knew the physical nature of the act he was about to commit, and that it would result in self-destruction, but he need not show that the insured was legally or morally responsible for his acts: *Mutual Ben. Life Ins. Co. v. Daviess*, 87 Ky. 541.

Under policies stipulating for nonliability in case the insured dies by his own hand, if it is admitted or proved that he committed suicide while insane, the insurer is still liable, though the insured intended to take his life and understood the physical nature and effect of his act: *Schultz v. Insurance Co.*, 40 Ohio St. 217; 48 Am. Rep. 676; *Manhattan*

Life Ins. Co. v. Broughton, 109 U. S. 121; but the burden of proof, in the first instance, is upon the party seeking to recover under the policy, to prove that the insured was insane at the time he killed himself, and that his self-destruction was not the act of one responsible for his actions: Weed v. Mutual etc. Life Ins. Co., 70 N. Y. 561; Phadenhauer v. Germania Life Ins. Co., 7 Heisk. 567; 19 Am. Rep. 623; Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414; Moore v. Connecticut etc. Life Ins. Co., 1 Flip. 363; Gay v. Union Mut. Life Ins. Co., 9 Blatchf. 142; Terry v. Life Ins. Co., 1 Dill. 403; affirmed 15 Wall. 580.

STATE v. JULOW.

[129 MISSOURI, 163.]

CONSTITUTIONAL LAW—ENJOYMENT OF LIFE, LIBERTY, AND PROPERTY.—A constitutional guaranty of the enjoyment of life, liberty, and property carries with it all that effectuates and renders complete the unrestrained enjoyment of that guaranty.

CONSTITUTIONAL LAW—ENJOYMENT OF PROPERTY.—A constitutional guaranty of the enjoyment of the right of property includes the right to acquire property by labor or contract, and of terminating a contract at pleasure, being civilly liable for any unwarranted termination.

CONSTITUTIONAL LAW.—DEPRIVING AN OWNER OF PROPERTY of one of its essential attributes is depriving him of his property, within the meaning of a constitutional guaranty, that no person shall be deprived of life, liberty, or property without due process of law.

LAW OF THE LAND AND DUE PROCESS OF LAW are legal equivalents, but everything which may pass under the form of statutory enactment need not necessarily be considered the law of the land.

CONSTITUTIONAL RIGHTS.—A statute declaring that to be a crime which consists alone in the exercise of a constitutional right, as that of terminating a contract, is unconstitutional and void.

EMPLOYER AND EMPLOYÉ.—A STATUTE WHICH ATTEMPTS to make it a crime for an employer to insist, and to impose as a condition of employment, or continued employment, that his employé shall withdraw from or refrain from joining any trade or labor union, is unconstitutional and void, as seeking to deprive the employer of a constitutional right without due process of law.

EMPLOYER AND EMPLOYÉ—CLASS LEGISLATION.—A statute making it an offense for an employer to impose as a condition to employment, or continued employment, that his employés shall not belong to a trade or labor union, is unconstitutional, and void as class or special legislation.

POLICE POWER.—The power to prohibit an employer from exercising his constitutional right to insist that his employés shall not belong to a trade or labor union is not within the police power of the state.

CONSTITUTIONAL RIGHTS CANNOT BE ABRIDGED by legislation under the guise of police regulation.

Appeal from a judgment imposing a fine of fifty dollars, under an information based upon the following statute:

"Section 1. No employer, superintendent, foreman, or other person exercising superintendence or authority over any mechanic, miner, engineer, fireman, switchman, baggageman, brakeman, conductor, telegraph operator, laborer, or other workingman, shall enter into any contract or agreement with any such employé, to withdraw from any trade union, labor union, or other lawful organization of which said employé may be a member, or requiring said employé to refrain from joining any trade union, labor union, or other lawful organization, or requiring any such employé to abstain from attending any meeting or assemblage of people called or held for lawful purposes, or shall, by any means, attempt to compel or coerce any employé into withdrawal from any lawful organization or society.

"Sec. 2. Corporations, and the managers, superintendents, overseers, master mechanics, foremen, officers, and directors, and others exercising authority for and on behalf of corporations doing business in this state, shall be subject to the provisions of this act, and, upon conviction of the violation of any of its provisions, to the punishment prescribed by it.

"Sec. 3. Any person or corporation violating any of the provisions of this act shall, upon conviction, be punished by a fine of not less than fifty dollars nor more than one thousand dollars, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

S. D. Jones & Williams, for the appellant.

R. F. Walker, attorney general, for the state.

¹⁷¹ SHERWOOD, J. 1. The defendant alleges various grounds why the act under which he was convicted is unconstitutional. Among them these: "Because the act of the legislature under which the said information was drawn is unconstitutional and void, because it violates the following provisions of the constitution of the state of Missouri: 1. 'That all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry': Const., art. 2, sec. 4; 2. 'That no person shall be deprived of life, liberty, or property without due process of law': Const., art. 2, sec. 30; 3. 'That the act of the legislature aforesaid violates the constitutional provision forbidding the legislature to grant 'to any corporation, association, or individual any special or exclusive right, privilege, or ¹⁷² immunity': Const.,

art. 4, sec. 53. That the act aforesaid violates the fourteenth amendment to the constitution of the United States, which provides: 'Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' "

For the present purpose, it will be assumed that defendant attempted to do the act with which he is charged, and that it lay in his power to compel, or coerce, Simmonds to withdraw from a lawful organization with which he was connected; because, by so doing, all discussion of matters merely preliminary to the main question herein involved will be avoided.

A similar provision to that contained in section 30, article 2, of the constitution, is found in the fifth amendment to the constitution of the United States, providing, among other things, "nor deprived of life, liberty, or property without due process of law." In section 30 of the constitution, as well as in a like section in the federal constitution just recited, it will be noted that the rights of life, liberty, and property are grouped together in the same sentence; they constitute a trinity of rights, and each, as opposed to unlawful deprivation thereof, is of equal constitutional importance. With each of these rights, under the operation of a familiar principle, every auxiliary right, every attribute necessary to make the principal right effectual and valuable in its most extensive sense, pass as incidents of the original grant. "The rights thus guaranteed are something more than the mere privileges of locomotion; the guaranty is the negation of arbitrary power in every form which results in a deprivation of a right."

These terms, "life," "liberty," and "property," are representative terms, and cover every right to which a member of the body politic is entitled under the law. ¹⁷³ Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties, personal, civil, and political; in short, all that makes life worth living; and of none of these liberties can anyone be deprived, except by due process of law: 2 Story on the Constitution, 5th ed., sec 1950.

Now, as before stated, each of the rights heretofore mentioned carries with it, as its natural and necessary coincident, all that effectuates and renders complete and full, unrestrained enjoyment of that right. Take, for instance, that of property; necessarily blended with that right are those of acquiring prop-

erty by labor, by contract, and also of terminating that contract at pleasure, being liable, however, civilly for any unwarranted termination. In the case at bar, as will be remembered, the contract was not made for any definite period. From these premises it follows that "depriving an owner of property of one of its essential attributes, is depriving him of his property, within the constitutional provision": *People v. Otis*, 90 N. Y. 48.

In *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 683, relative to the subject under consideration, it is said: "The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the constitution."

In the present instance, does the act in question seek to deprive the owner, or the representative of the owner, of one of the essential attributes of his property, to wit, the right to terminate any contract made by him, and does it profess to do this by force of its own terms, and without opportunity of being heard? If it does, then it falls under the ban of the prohibitory provisions of both the state and federal constitutions.

¹⁷⁴ The "law of the land" and "due process of law" are the legal equivalents of each other. Touching this topic, a distinguished jurist observes: "Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College* case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land': *Cooley's Constitutional Limitations*, 6th ed., 431.

Comstock, J., when discussing a constitutional prohibition such as ours, said: "No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested, that 'the law of the land,' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. . . . Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal

are appointed to execute the sentence. If this is the 'law of the land,' and 'due process of law,' within the meaning of the constitution, then the legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed by the constitution in the same category with ¹⁷⁵ liberty and life": *Wynehamer v. People*, 13 N. Y. 378.

Here, the law under review declares that to be a crime which consists alone in the exercise of a constitutional right, to wit, that of terminating a contract, one of the essential attributes of property, indeed property itself, under preceding definitions. Brought to the bar of a court on such a charge, the accused would have been prejudiced, in so far as the criminality of the act charged is concerned; no question could there be made or admitted as to the quality of the act; that would have been settled by the previous legislative declaration, and it would only remain to find the fact as charged, in order to declare the guilt as charged. But the fact, as charged as already seen, is not a crime, and will not be a crime, so long as constitutional guaranties and constitutional prohibitions are respected and enforced.

If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract as all others may; if he disobeys it, then he is punished for the performance of an act wholly innocent, unless, indeed, the doing of such act guaranteed by the organic law, the exercise of a right of which the legislature is forbidden to deprive him, can, by that body, be conclusively pronounced criminal. We deny the power of the legislature to do this; to brand as an offense that which the constitution designates and declares to be a right, and therefore an innocent act, and, consequently, we hold that the statute which professes to exert such a power is nothing more nor less than a "legislative judgment," and an attempt to deprive all who are included within its terms of a constitutional right without due process of law. In support of these views, see *State v. Loomis*, 115 Mo. 307; *Commonwealth v. Perry*, 155 Mass. 117; 31 Am. St. Rep. 533; *Godcharles v. Wigeman*, 113 Pa. St. ¹⁷⁶ 431; *State v. Goodwill*, 33 W. Va. 179; 25 Am. St. Rep. 863; *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465; *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869; *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315.

2. But the statute is obnoxious to criticism on other grounds.

It does not relate to persons or things as a class—to all workmen, etc.—but only to those who belong to some “lawful organization or society,” evidently referring to a trade union, labor union, etc. Where a statute does this, where it does not relate to persons or things as a class, but to particular persons or things of a class, it is a special, as contradistinguished from a general, law: *State v. Tolle*, 71 Mo. 645; *State v. Herrmann*, 75 Mo. 340.

Here a nontrade unionman, or nonlabor unionman, could be discharged without ceremony, without let or hindrance, whenever the employer so desired, with or without reason therefor, while, in the case of a trade union or labor union man, he could not be discharged, if such discharge rested on the ground of his being a member of such an organization. In other words, the legislature has undertaken to limit the power of the owner or employer as to his right to contract with, or to terminate a contract with, particular persons of a class, and, therefore, the statute which does this is a special, not a general, law, and, therefore, violative of the constitution.

Judge Cooley says: “A statute would not be constitutional which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt. . . . Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is ¹⁷⁷ applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments”: *Cooley on the Constitution*, 6th ed., 481-483.

The legislature may legislate in regard to a class of persons; but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each. This would be mere arbitrary classification, without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair or other individual peculiarities, something not competent for the legislature to do: *State v. Herrmann*, 75 Mo. 353.

3. The litigated statute is also in conflict with section 1, article 14, of the federal constitution aforesaid, forbidding that “any state deprive any person of life, liberty, or property without due process of law,” as to which the same considerations as heretofore announced apply.

4. Nor can the statute escape censure by assuming the label of a police regulation. It has none of the elements or attributes which pertain to such a regulation, for it does not, in terms or by implication, promote, or tend to promote, the public health, welfare, comfort, or safety; and, if it did, the state would not be allowed, under the guise and pretense of police regulation, to encroach or trample upon any of the just rights of the citizen, which the constitution intended to secure against diminution or abridgment: *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636, and cases cited.

5. In conclusion, it may be said that there is a broad distinction between the invasion of a right conferred ¹⁷⁸ by the constitution, to wit, a right of property, carrying with it, as we have seen, all the liberties, attributes, and coincident rights which go to effectuate the principal right, and those rights which are the mere creatures of legislative gratuity, where the legislature granting a privilege or bestowing a bounty may, of course, as no constitutional right is involved, prescribe the conditions upon which the privilege may be exercised or the bounty be obtained. This point finds ample illustration in the recent cases of *Frisbie v. United States*, 157 U. S. 160, and *St. Joseph v. Levin*, 128 Mo. 588; 49 Am. St. Rep. 577.

The premises considered, we reverse the judgment, and order the defendant discharged.

All concur.

CONSTITUTIONAL LAW—ENJOYMENT OF LIFE, LIBERTY, AND HAPPINESS.—Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts: *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315, and note. See, especially, the extended note to *State v. Goodwill*, 25 Am. St. Rep. 876, 881.

CONSTITUTIONAL LAW.—"DUE PROCESS OF LAW" or "law of the land," means general public law, binding upon all members of the community, under all circumstances, and not partial nor private laws, affecting the rights of private individuals or classes of individuals: *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206, and note in which the cases are collected discussing the validity of statutes attempting to regulate the relation between employers and employes. Due process of law, or due course of law, or law of the land, is such an exercise of the powers of government as the settled maxims of the law permit, under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs: *Wulzen v. Board of Supervisors*, 101 Cal. 15; 40 Am. St. Rep. 17, and note.

POLICE POWER.—Rights of person or property cannot be invaded under the guise of the police power: *First Nat. Bank v. Sarlls*, 129 Ind. 201; 28 Am. St. Rep. 185; *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315, and note; *Smiley v. McDonald*, 42 Neb. 5; 47 Am. St. Rep. 684, and note. See, also, the extended note to *State v. Goodwill*, 25 Am. St. Rep. 882.

CONSTITUTIONAL LAW—RIGHT TO CONTRACT.—The legislature has no power to prevent persons who are sui juris from making their own contracts, nor can it interfere with the freedom to contract between workmen and employers: *Ritchie v. People*, 155 Ill. 98; 48 Am. St. Rep. 315, and note.

COX v. ARNOLD.

[129 MISSOURI, 837.]

RIPARIAN OWNERS ON A NAVIGABLE STREAM hold only to the water's edge.

ACCRETIONS.—If part of a tract of land bordering on a navigable river is submerged or washed away, the owner cannot regain it, except by accretion beginning at his line at the water's edge.

ACCRETIONS.—A riparian owner of land acquires, as an incident thereto, without price, whatever may be added to it by gradual and imperceptible accretion, but he assumes the risk of losing it all by its being washed away by the waters of the river, and his boundary line always remains at the water's edge.

RIPARIAN RIGHTS—BOUNDARIES.—A riparian owner's boundary expands as the waters recede and accretions form to his land, and it contracts as the waters encroach upon and wash away his land.

ACCRETIONS.—A riparian owner cannot recover, as an accretion, land which has reformed within the boundaries of the original survey of his tract at a place where the land was, at the time of such survey, uncovered by water, and which has not accreted to his land beginning at his line at the water's edge.

EJECTMENT.—PLAINTIFF IN EJECTMENT MUST RECOVER upon the strength of his own title, and not upon the weakness of his adversary's.

R. C. Clark and J. Cosgrove, for the appellant.

Draffen & Williams, for the respondents.

239 **BURGESS, J.** Ejectment for a tract of land in Howard county, Missouri, described as follows: Southwest fractional quarter of section 4, township 48, range 15, beginning at the quarter section corner on the west side of section 4, as established by E. E. Dunaway; thence running south seventeen chains to a point on the original bank of the Missouri river; thence south to the middle of the old channel of said river; thence down said channel to the line between George B. Cox and H. Walters; thence north to said Walters' northwest corner; thence north seventy-two and one-half degrees east along said Walters' north line to the middle line dividing said section running east and west; thence west to the point of beginning, containing one

hundred and thirty-seven acres, more or less. The petition was in the usual form, and the answer a general denial.

The land formed in the Missouri river after the government survey in 1816, between an island known as "Naylor's Island" and said southwest fractional quarter section 4, which lies on the north bank of the river opposite said island. The land in question is the same that was in controversy in *Naylor v. Cox*, 114 Mo. 232. The defendants Arnold, Arnold & Ray are tenants of the defendant Naylor.

It was admitted upon the trial that the southwest fractional quarter of said section 4 was patented to Charles B. O'Neill in 1837. Plaintiff showed a regular chain of title from O'Neill to himself. It was also ³⁴⁰ admitted that at the time of the original survey, and the date of said patent, the main body of water of the Missouri river ran along the southern boundary of said fractional quarter, and between it and "Naylor's Island," lying immediately south of it; that said island belongs to defendant Naylor, and that defendants were, at the time of the commencement of this suit, in possession of said island, and of the land in question.

The evidence tended to show that, after said quarter section was patented to O'Neill, a large portion of it was washed away by the action of the waters of the river, which gradually cut away its bank, the river moving further north until its main channel was within the boundaries of said quarter section, the river bed covering a large portion of the area that was formerly within the boundary of said quarter, the waters of the river continuing to run over this area for a number of years; that what was called by the witnesses a "towhead" formed in 1871, in the main channel of the river, between plaintiff's land and "Naylor's Island," but, at the time of the government survey in 1816, was within the boundaries of said quarter; that at the time of the trial, the amount of water of the main channel of the river, that passed between the main land and the "towhead," was about equal to that between Naylor's Island and the "towhead"; that land was gradually formed to the "towhead" and extended toward the island, and also toward the main land, and that the land sued for was not formed against or added to plaintiff's land by accretion, but began to be formed where the "towhead" first made its appearance, which was within the original boundaries of said quarter section as originally surveyed. There was also evidence, on cross-examination of the witnesses, going to show that the land was formed by accretion to Naylor's Island.

³⁴¹ At the conclusion of all the evidence, defendants interposed a demurrer thereto, which was sustained. Plaintiff then took a nonsuit with leave to move to set the same aside, which being overruled, after taking the proper steps, he appealed.

It is contended by plaintiff that, as he is the owner of the southwest fractional quarter of section 4, township 48, range 15, a part of which was never submerged, that notwithstanding the Missouri river is a navigable stream, the situs of the land in question was entirely washed away—was for a number of years in the channel of, and submerged by, the waters of said river, and that its re-formation began in the channel of that stream—yet, as the water receded from the submerged portion, and that which first reappeared is within the original survey of said quarter section, he is the owner thereof, and all accretions thereto, and entitled to its possession.

It is well settled in this state, by an unbroken line of decisions, that a riparian proprietor on a navigable stream only owns to the water's edge: *Cooley v. Golden*, 117 Mo. 33; *Naylor v. Cox*, 114 Mo. 232; *Rees v. McDaniel*, 115 Mo. 145; *St. Louis etc. R. R. Co. v. St. Louis etc. Stock Yards Co.*, 120 Mo. 541; *Benson v. Morrow*, 61 Mo. 345.

When a riparian owner becomes the owner of land, he acquires, as incident thereto, without price, whatever may be added to it by gradual and imperceptible accretion; while, at the same time, he assumes the risk of losing it all by its being gradually washed away by the waters of the river, but his line always remains at the water's edge, wherever that may be. His line expands as the waters recede and accretions form to his land, and contracts as the waters encroach upon and wash away his land. The only way that plaintiff could have regained what land he had lost by its being washed away, and its situs submerged by the waters of the ³⁴² river, was by gradual and imperceptible accretion, beginning at his line at the water's edge. In this way, he would become the owner and entitled to the possession of all land accreted to his original tract, or that portion of it which had not been washed away: *Naylor v. Cox*, 114 Mo. 232.

Plaintiff's line being at the water's edge, he was not entitled to recover in this action, notwithstanding the land began to re-form within the boundaries of the original survey of said quarter section at a place where the land was, at the time of said survey, uncovered by water, and it makes no difference that defendant *Naylor* may not be the legal owner, or that defendants may be in its wrongful possession. Plaintiff must recover, if at all,

upon the strength of his own title, and not upon the weakness of his adversary's. We will not undertake to say to whom the land in question belongs. It is sufficient to a determination of this case that plaintiff has not shown title thereto, or that he is entitled to its possession.

Plaintiff relies on *Buse v. Russell*, 86 Mo. 209, as sustaining his contention, but an examination of that case will show that no such question as the one now under consideration was involved in that case. The question there was in regard to accretions to a surveyed island, and, while it is true that it was said, "if the island washed away, in whole or in part, after it was surveyed, and then re-formed on the same bed, plaintiff is entitled to recover," it was also said that "what might be the law if the island had washed away wholly, so as to become a part of the navigable portion of the river, and so remained for any considerable length of time, we are not called upon to determine by any of the facts in this case, nor do the instructions hypothecate any such state of facts." Here the land sued for was remade, and where the land was originally became ⁸⁴³ a part of the channel of the navigable river, and so remained for many years—the very question with respect to which it was said in that case that what might be the law the court was not called upon to determine.

The case was tried in accordance with the views herein expressed, the judgment was for the right party, and should be affirmed.

It is so ordered.

All concur, except Brace, C. J., who dissents.

WATERS AS BOUNDARIES—RIGHT OF RIPARIAN OWNER ON NAVIGABLE STREAM.—A grant by the state to a riparian proprietor, running with a navigable stream, extends only to low-water mark: *State v. Eason*, 114 N. C. 787; 41 Am. St. Rep. 811. This question is fully treated in the extended note to *Allen v. Weber*, 27 Am. St. Rep. 56-63.

WATERS—ACCRETION—RIGHTS OF RIPARIAN OWNER.—To give a littoral proprietor title to land by accretion, the increase must be in such imperceptible degrees that although persons are able to perceive that, from time to time, the land has increased on the water line, they could not perceive the progress of the accumulation at the time it was made: *Saunders v. New York etc. R. R. Co.*, 144 N. Y. 75; 43 Am. St. Rep. 729, and note. See the extended treatment of this subject contained in the monographic note to *Coulthard v. Stevens*, 35 Am. St. Rep. 307-313.

EJECTMENT.—THE PLAINTIFF MUST RECOVER ON THE STRENGTH OF HIS OWN TITLE: *Compton v. Mathews*, 3 La. 128; 22 Am. Dec. 167; and not upon the weakness of his adversary's: *Huntington v. Jewett*, 25 Iowa, 249; 95 Am. Dec. 788, and note; *Greve v. Coffin*, 14 Minn. 345; 100 Am. Dec. 229.

STEPHENS v. STEPHENS.

[129 MISSOURI, 422.]

WILLS — EXECUTION — SIGNATURE.—A declaration by a testator to certain persons that an instrument is his will, and his request to them to attest it as his will, is sufficient proof of its due execution as such, although it is signed with a mark between the words of his name, and none of the witnesses saw him attach such mark before they attested the instrument.

Moore & Williams, for the appellant.

Draffen & Williams and J. E. Hazell, for the respondent.

424 BARCLAY, J. This is a proceeding to contest the alleged will of Thomas Stephens, deceased. Plaintiff is the son of Mr. Stephens. The defendants are other children of the deceased, and some grandchildren. The will is in favor of defendants, the plaintiff receiving only a nominal legacy of five dollars. It has been admitted to probate in ordinary form, in the probate court of the county.

The grounds of the contest are, in substance, that the testator was not of sound mind at the date of the writing, that the latter was obtained by undue influence, and, generally, that it is not his will.

At the trial, the defendants, as proponents of the document, took up the burden of proof. At the close of their testimony, the trial judge gave an instruction as follows: "The court declares the law to be, that the burden is upon the defendants to show that the paper writing **425** produced as the will of Thomas Stephens, deceased, was signed by him, or someone, by his direction, in his presence; and, in the absence of such proof, the court must find that such paper is not the last will and testament of said deceased."

The court thereupon entered judgment declaring that the paper was not the will of the deceased. From that judgment defendants appealed, after an unsuccessful motion for new trial and the saving of proper exceptions to the rulings of which they complain.

The decision of the appeal turns on the sufficiency of the defendants' testimony to sustain the affirmative of the issue touching the due execution of the document.

The evidence tended to show that the will was not signed by Thomas Stephens himself, but that his name was in the handwriting of William G. Howard. The signature and attestation are as follows:

"Witness my hand and seal this twelfth day of March, A. D. 1888.

his
"THOMAS X STEPHENS.
mark

"Attest:

"William G. Howard,
"C. C. D. Carlos,
"J. A. J. Howard,
"J. T. Gray."

The first of these attesting witnesses was proven to have died before the trial; the others were called as witnesses. All testified to having attested the document as the will of Mr. Stephens, in his presence. Their evidence also goes to establish his soundness of mind when the will was made.

On these points plaintiff now raises no question. The only present controversy is upon the issue whether or not the paper was duly signed by the testator.

426 The latter declared to several of the witnesses that the paper was his will, and on the occasion when he called them together at the office of the first named, William G. Howard. The will and the name of the testator are in the handwriting of that witness. No one testified to seeing Mr. Stephens make his mark. One witness testified that it was his mark; and all agreed that he called them to witness that the paper was his will.

The statutes governing the subject are as follows:

"Sec. 8870. Every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

"Sec. 6570. . . . 6. The word 'will' shall include the words 'testament' and 'codicil'; 7. The words 'written' and 'in writing,' and 'writing word for word,' shall include printing, lithographing, or other mode of representing words and letters, but, in all cases where the written signature of any person is required, the proper handwriting of such person, or his mark, shall be intended."

The document on its face declares that the cross (between the words "Thomas" and "Stephens") is "his mark." His act in presenting the paper in that condition to the witnesses, to be by them attested as his will, tended to show an adoption or recognition of that sign as his mark, which the law, above quoted, permitted him to use in lieu of other signature. Such a mark is, in legal effect, his signature to the document, within the meaning

of the statute of wills (section 8870) as construed by the light of section 6570.

We think the defendants' evidence had a fair tendency to prove a sufficient signing of the document under prior decisions, which relieve us of the necessity ⁴²⁷ of discussing the question as an original one: *Cravens v. Faulconer* (1859), 28 Mo. 19; *Grimm v. Tittman* (1892), 113 Mo. 56. See, also, *In re Guilfoyle* (1892), 96 Cal. 598, with note in 22 L. R. A. 370.

The learned trial judge was in error in holding that there was an "absence of proof" that the paper writing was signed by the testator.

The judgment is reversed and the cause remanded.

Brace, C. J., and Macfarlane and Robinson, JJ., concur.

WILLS—EXECUTION.—It is not necessary that a testator should have acknowledged his signature to a will, if he produces a paper which he declares to be his will, and asks the witnesses to sign it, and states that it is not necessary for them to know what is in it: *Hobart v. Hobart*, 154 Ill. 610; 45 Am. St. Rep. 151, and note. The will must be signed by the testator before there can be any valid attestation or subscription, but it need not be signed in the presence of either witness, nor need either actually see the testator's signature. It is sufficient that the will be produced, signed by the testator, and in such a way that the signature may be seen by the witnesses, and that he request them to witness it as his will: *Simmons v. Leonard*, 91 Tenn. 183; 30 Am. St. Rep. 875, and especially note.

KEARNEY BANK v. FROMAN.

[129 MISSOURI, 427.]

CORPORATIONS—NOTICE TO OFFICER AS NOTICE TO CORPORATION.—Knowledge which comes to an officer of a corporation through his private transactions, and beyond the range of his official duties, is not notice to the corporation, although he is, at the time, the managing agent of the corporation.

CORPORATIONS—DECLARATIONS OF OFFICER—EVIDENCE.—In an action by a bank on a note against two parties, as partners, a declaration made to a third person by an officer of the bank having no connection with its active management, that he does not regard the defendants as partners, is incompetent as evidence to show that the knowledge of such officer is notice to the bank that the defendants are not partners. The admission of such evidence is prejudicial and reversible error.

Simrall & Trimble, for the appellant.

Dougherty & Dougherty, Lincoln & Emerson, and Hardwicke & Hardwicke, for the respondent.

428 MACFARLANE, J. Action against both defendants on two promissory notes, each of which was signed by S. C. Froman alone. Defendants were charged as partners doing business under the firm name of S. C. **429** Froman. Two controlling issues were made by the pleadings: 1. Were defendants in fact partners; and 2. If not, did James H. Froman hold himself out to plaintiff as such partner?

Samuel C. Froman, a son of James H., was engaged in buying, selling, and dealing in mules. The evidence tended to prove that James H. Froman had an interest in some of the mules bought and sold by his son, and that he informed the officers of the bank that he was a partner. It appeared from the evidence that Samuel C., from time to time, borrowed money from plaintiff bank. For the money so borrowed, in a number of instances, notes signed by both the defendants were given the bank. These notes were finally taken up, and a new note for about four thousand five hundred dollars, signed by both defendants, was given in place of them. In dealing with the bank, the notes were generally signed by S. C. Froman alone.

Samuel H. Smith, a witness for defendant, was permitted to testify, over the objection of plaintiff, that one Henry Anderson, a director of the bank, told him "that Froman was Sam's security for about four thousand five hundred dollars in their bank."

The court instructed the jury that "such statement by Anderson to Smith may be considered by the jury, in so far as it bears on the question whether the bank had knowledge of the relation that James H. Froman sustained to Samuel C. Froman, as such knowledge, if any, on the part of the bank, may bear upon the question, submitted in the fifth instruction, whether the bank was led to believe, in the manner stated in the fifth instruction, that James H. Froman was a partner, and extended credit and took notes sued on upon the faith of such partnership."

The admission of this evidence and giving this instruction are the only errors assigned.

430 The evidence could have been offered for no other purpose than that of proving that plaintiff bank had knowledge that James H. Froman occupied the relation of surety to his son Samuel C. Froman on the notes jointly signed by them, and not that of partner.

It was not shown that the director, whose declaration was proved, had any connection with the active business affairs of the bank whatever. In the circumstances, the evidence was clearly admissible. The knowledge of a mere director, having no fur-

ther authority than the position itself implies, cannot be imputed to the corporation. The law is well settled in this state that "knowledge which comes to an officer of a corporation, through his private transactions, and beyond the range of his official duties, is not notice to the corporation." This is the rule, though the officer obtaining the knowledge was, at the time, the managing agent of the corporation: *Benton v. German American Bank*, 122 Mo. 339; *Johnston v. Shortridge*, 93 Mo. 227; *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519; 35 Am. St. Rep. 770.

Defendant insists that the error was a harmless one, and that the judgment should not be reversed for the admission of improper testimony, when the fact in issue is established by other evidence.

The rule invoked has application only in cases in which appellate courts weigh the evidence, or in law cases where there is no conflict in the evidence on the particular issue. In case of a conflict in the evidence, in actions at law, the issues of fact must be determined by the triers of the facts upon all the evidence, and the appellate court will not say what weight may have been given any particular part of it, or that any portion of it was without weight. It may be true that the preponderance of evidence appears to support the theory that the bank had knowledge that, in other transactions ⁴³¹ with it, James H. Froman was merely a surety of his son, but there was certainly substantial evidence tending to prove the contrary.

The evidence showing that a director of the bank had knowledge of the relation of these parties, in such transactions, may have been of convincing force to the jury that he had imparted his knowledge to the bank, or they may have inferred, which the instruction virtually authorized them to do, that his knowledge could be taken as the knowledge of the bank. We cannot, therefore, say that the admission of the evidence was not prejudicial.

Reversed and remanded.

All concur.

CORPORATIONS—NOTICE TO OFFICER AS NOTICE TO CORPORATION.—An officer's knowledge, derived as an individual, and not while acting officially for the corporation, cannot operate to its prejudice: *Casco Nat. Bank v. Clark*, 139 N. Y. 307; 36 Am. St. Rep. 705, and note.

CORPORATIONS.—Declarations of the officers of a corporation bind it only when made in the course of the performance of their authorized duties, so that such declarations constitute part of the *res gestæ*: *Browning v. Hinkle*, 48 Minn. 544; 31 Am. St. Rep. 691, and note.

LANDA v. HOLCK.

[129 MISSOURI, 668.]

CARRIERS—GARNISHMENT OF.—Property in the possession of a common carrier, awaiting shipment, is subject to garnishment at any time before its transit has commenced.

CARRIERS.—GARNISHMENT of property in the possession of a common carrier excuses failure to deliver according to contract.

CARRIERS—GARNISHMENT—ESTOPPEL.—A common carrier having adopted a certain place as a station on its line, and entered into a contract of carriage therefrom, is estopped to deny, in garnishment proceedings, that property delivered in its yard at such place, and awaiting shipment by it, is in its possession.

CARRIERS—INTERSTATE COMMERCE.—A statute permitting the garnishment of common carriers is not a regulation of interstate commerce.

Jackson & Montgomery and H. C. Ward, for the appellant.

I. J. Ringolsky, for the respondent.

665 GANTT, P. J. The plaintiff resides in Kansas City, Missouri. The defendants Holck & Co. live at Eagle Pass, Texas. On the 29th of September, 1892, plaintiffs commenced an action against defendants to recover six hundred dollars, and sued out an attachment in aid thereof, and caused the Missouri, Kansas & Texas Railway Company to be summoned as garnishee about 6 o'clock P. M. of the same day. At the next term of the court, interrogatories were duly propounded by plaintiff, and the garnishee, the appellant herein, made its answer:

"That at the time of the service of the summons of garnishment herein, it had in its possession a carload of lard, which had been delivered to this garnishee by the Armour Packing Company, at Kansas City, Missouri, consigned to C. Holck & Co., at Eagle Pass, Texas, to be transported by this garnishee as a common carrier, and by it, as such carrier, to be delivered to said consignee at said destination of Eagle Pass, in the state of Texas, over and by means and way of this garnishee's railroad, and its connecting line; that at the time of the service of summons herein, this garnishee had issued its bill of lading, covering said lard, to said Armour Packing Company, consignor 666 thereof, and the said carload of lard was in the course of transportation between said points by this garnishee as a common carrier, as aforesaid; and this garnishee further answers that it did not at said time, and has not any time since, had in its possession any other belonging to or consigned to said C. Holck & Co., or to Holck & Co., or either of them."

To this answer plaintiff filed a denial, admitting that the garnishee had in its possession the carload of lard when served with the garnishment, but denied that said lard was in transit, and averred that it was held by the garnishee in its yards, preparatory to shipment to defendants at Eagle Pass, Texas, and was not accessible to the sheriff of Jackson county, Missouri, and, therefore, could not be taken into his possession under the writ of attachment.

The garnishee replied to this denial, and admitted that, at the time of the service of the garnishment, it had in its possession a carload of lard consigned to Holck & Co.; and then set up that the lard was accessible to the sheriff of Jackson county, Missouri, before it left Kansas City, Missouri. It then set up that the garnishee did not have possession of the lard until it reached Paola, Kansas, that the Kansas City, Fort Scott & Memphis Railway Company, known as the "Gulf," or "Scott," road, had possession of the lard at the time of the service of the writ of garnishment upon it. That the Gulf road makes the haul of all of garnishee's goods from Kansas City, Missouri, to Paola, Kansas, and that the Gulf road owns and controls the yards in which this carload of lard was placed by the Armour Packing Company. It also set up that the lard was "in transit" when respondent was garnished.

At a trial of these issues, made up by the pleadings and the motion, to dismiss the garnishee, before ⁶⁶⁷ the judge, without a jury, there was a finding for the plaintiff, and, in rendering a judgment as required by the statutes, the court found that, at the time respondent was garnished, it had in its possession a carload of lard, the property of defendants, and the court further stated in the judgment that it found, from the evidence, that the car containing said lard was not in transit, and that said lard was subject to garnishment.

Without material contradiction, the evidence disclosed that at 12:15 P. M., September 29, 1892, the Armour Packing Company, at Kansas City, Missouri, turned over on their packing-house track a carload of lard, to a switching crew of the Memphis & Fort Scott railroad, and by this crew it was hauled into the yards of the Memphis road at Kansas City; that thereupon Mr. Norton, the agent of the garnishee, at Kansas City, issued its through bill of lading to the Armour Packing Company for said car, consigning it to Holck & Co., Eagle Pass, Texas. That by virtue of a traffic agreement between the Gulf and Memphis Railway Company, and the Missouri, Kansas & Texas Railway

Company, the Gulf road hauls all goods received by the Missouri, Kansas & Texas Railway Company at Kansas City, for points on the Missouri, Kansas & Texas railway, to Paola, Kansas. That the Missouri, Kansas & Texas issues its through bills of lading from Kansas City to such points. That the Gulf issues no bills of lading for goods it hauls under this agreement from Kansas City to Paola.

Mr. Norton also stated that he was served with the writ of garnishment about 6 o'clock the evening of September 29, 1892, and that the evening trains pull out about 7:15 P. M.; that the cars, before they leave, are in the Fort Scott yards in Kansas City, Jackson county, Missouri, about a half mile south of his office. The arrangement of the Scott road with appellant is, that ~~668~~ the appellant pays the Scott road so much per car for hauling from Kansas City, Missouri, to Paola, Kansas. The reason the appellant did n't set out the car of lard when it was garnished was, because the agent, Norton, did n't look for a car of lard. He, knowing the plaintiffs and defendants were grainmen, only looked for grain. Mr. Norton did not know where the car of lard was when appellant was garnished, only that it was brought from Armour's and placed in the yards.

He further states that this particular car of lard left Kansas City at 8 o'clock the night of September 29, 1892; that it was standing in the yards from 6, when the defendant was garnished, to 8 o'clock that evening; that it had not yet started on its trip; that the appellant gives bills of lading from any outside point into Kansas City, Missouri; that the number of car containing the lard in question was 3020, and was a car belonging to appellant; and that he had absolute control of this car of lard, and could have ordered it held back if he wanted to; that it was stopped by him at Dennison, Texas, and bonded by defendants; that appellants issue maps and timetables showing the Missouri, Kansas & Texas Railway Company runs into Kansas City, Missouri.

Mr. McVay, a switchman for the Scott road, says that Armour has a private track running from the packing-house to the Scott yards; that he hauled a car of lard in dispute from Armour's at 12:15 on September 29, 1895, and it reached the yards sometime between that time and 6 o'clock; that no record is kept of the track the car is on, and no one knew where this car of lard was on September 29, 1895; that it would take an experienced man two hours to go over the yards and find a particular car, and that it would take an inexperienced man much longer; that the car

was taken from Armour's to the yards to be made up into a train.

Mr Messenger, the yardmaster, testified that a car of lard sent over to the yards at 12:15 P. M. would not be made up into a train until about 6 P. M.; that as soon as they got enough cars to make a train, say fourteen cars, they couple them together and send them into the yards, until a schedule time for them to be pulled out. And then the engine is attached, and at the schedule time the train is pulled out.

The garnishee prayed instructions as follows:

"1. The court declares the law to be, that under the pleadings and the evidence in this case, the Missouri, Kansas & Texas Railway Company cannot be held as a garnishee in this proceeding, and it must be discharged.

"2. The court declares the law to be, that a common carrier is compelled, by the constitution and laws of the state of Missouri, to serve all persons impartially, and is compelled to receive merchandise offered for transportation, and to deliver the same to the consignee, or his assignee, at the place of destination, without any notice as to who is the person entitled to receive such merchandise, prior to proper demand therefor at the place of delivery, and, therefore, it is contrary to public policy that a common carrier should be charged as a garnishee on account of property delivered to it for transportation, and that to attempt to so charge a common carrier would be violative of the constitution and laws of the state regulating the rights and duties of common carriers.

"3. The court declares the law to be, that if the evidence in this case establishes that the Missouri, Kansas & Texas Railway Company did not own or operate any track or tracks in and into Kansas City, Missouri, or Kansas City, Kansas, and that business destined for transportation over the said Missouri, Kansas & Texas Railway was handled in said cities above named, and from there to Paola, Kansas, by the Kansas City, Fort Scott & Gulf Railway Company, and was turned over and delivered to the said Missouri, Kansas & Texas Railway Company at said Paola, Kansas, and that the said Missouri, Kansas & Texas Railway Company did not have control or authority over the men who were engaged in handling such business prior to its arrival in Paola, Kansas, then said Missouri, Kansas & Texas Railway Company cannot be held as garnishee on account of any property which may have been in charge of said Kansas City, Fort Scott & Gulf Railway Company, or its employes.

"4. The court also declares the law to be, that under the evi-

dence in this case, the carload of lard in question was in course of transportation from the time it was loaded upon the car at the Armour Packing Company's warehouse, and the Missouri, Kansas & Texas Railway Company cannot be held as garnishee on account of said consignment of lard by the Armour Packing Company to C. Holck & Co., nor on account of the issuance of a bill of lading by said railway company, whether the summons in garnishment was served before or after said carload of lard left Kansas City, Missouri, or Kansas City, Kansas."

The court refused all of them, and the garnishee excepted. The plaintiff did not ask any instructions.

1. An exceedingly interesting brief has been filed in behalf of the appellant, the garnishee, but it will not be necessary for us to pass upon some of the questions suggested by the argument.

The broad proposition is laid down that the railway company, though it admits it had in its possession a carload of lard in Jackson county, Missouri, belonging to the defendants in the attachment, at the time ⁶⁷¹ the writ of garnishment was duly served upon it, is not subject to garnishment, because this lard had been delivered to it for transportation. The argument in brief is, that the nature of the possession of a carrier is such that, from motives of public policy, it should not be held liable as a garnishee on account of its possession of property delivered to it for shipment; that the law imposes upon the carrier the duty of transporting such goods as may be tendered for that purpose, and to subject it to garnishment must result in great inconvenience to the carrier, and that it would often be difficult for it to answer intelligently.

By positive statutory provisions, garnishment of railroad and other corporation carriers is permitted: Rev. Stats. 1889, c. 10, sec. 543, c. 74. We are unable to see any good reason why a common carrier should not be liable to garnishment in the same manner as other bailees, unless the nature of its contract is such that a judgment against it would be no protection against a claim by its bailor or consignor.

This claim of exemption from garnishment was met by the supreme judicial court of Massachusetts in the case of *Adams v. Scott*, 104 Mass. 164, in these words: "But we are of opinion that such judgment would be a sufficient excuse to the trustee [garnishee] for a failure to deliver according to his contract. The doctrine of the common law, that a carrier is responsible for all losses, except those occurring by the act of God or a public enemy, has no application to a case like the present. There has been no

loss, but the defendant's property has been sequestered by the law, to be applied to his use and benefit. Every man holds his property subject to be attached, and whenever property is attached in a suit against the owner, and taken into the custody of the law, it excuses the person having possession of it from performing his promise, express ⁶⁷² or implied, to deliver it to the owner. . . . The necessary effect of every trustee process is, by diverting the property to the payment of the creditor, to prevent the trustee from strictly performing his contract with the defendant." In that case, the garnishee was the Adams Express Company, and the property attached, a money package.

Why should a defendant in attachment, whose property is found in the hands of a carrier, be more favored than one whose property is seized in the hands of a private individual or corporation who is not a carrier? The remedy is drastic, but it is often the only means of enforcing the payment of a debt, and the inconvenience to which the bailee is subjected is compensated in proper allowances for his time and counsel fees. But if not, it cannot be allowed to outweigh the end in view, the subjection of the defendant's property to the payment of his debts. Various decisions are cited by counsel for garnishee, but they do not meet the question at issue.

In *Bates v. Chicago etc. R. R. Co.*, 60 Wis. 296, 50 Am. Rep. 369, the facts were undisputed, and showed that the goods were not in the state of Wisconsin when the garnishment was served, but were in the state of Illinois, and the supreme court held that, notwithstanding the general language of the garnishment act, the property in the hands of the garnishee or under his control must be limited to the property within that state. We have no such question under consideration here. In this case, the property was in the county and state in which the court sat and in which plaintiff resided.

The court in that case also discussed the question, whether a common carrier could be held liable upon a garnishee summons for personal chattels in its possession in actual transit at the time the summons was served, and held that it could not, but expressly declined ⁶⁷³ to decide whether goods in a depot of a railway station in that state, either before transit, or after, and awaiting delivery after their arrival at the place of delivery, would be subject to garnishee process. We are relieved from deciding this point also by the finding of the circuit court that this car of lard was not in transit when the writ of garnishment was served upon defendant, a finding justified by the evidence.

Another case relied on is Illinois Cent. R. R. Co. v. Cobb, 48 Ill. 402, in which the court held that when property was in actual transit, and had left the county in which the writ was served before it was served on the company, the company could not be held on the garnishment, but in that case Breese, C. J., said: "When the goods are in the depot of a railway company, in the county in which the attachment proceedings are instituted, there could, perhaps, be no objection to such process, but on this point we express no definite opinion."

The facts of this case do not show a case of actual transit at the time of the garnishment. The car had simply been delivered to defendant in its yards at Kansas City, and was awaiting shipment.

Having admitted its possession of the lard belonging to defendants at Kansas City, and the evidence all concurring that it issued its bill of lading therefor from Kansas City to Eagle Pass, and that it also constantly took consignments into Kansas City, and had a traffic arrangement with the Gulf by which it was enabled to thus accept and forward all matter intrusted to it for transportation, it cannot be heard to say that it did not have the possession. Having adopted Kansas City as a station on its line, and entered into the contract of carriage therefrom, it was estopped from denying its possession. For the purpose of this shipment, and ⁶⁷⁴ under its traffic arrangement with the Gulf, that portion of the Gulf from Kansas City to Paola and its yards at Kansas City became, as to shippers over its road and those claiming under or against them, a part of the garnishee's road: Emerson v. St. Louis etc. Ry. Co., 111 Mo. 161. Accordingly, we find nothing which exempts the garnishee from the garnishment act. The right of stoppage in transitu does not arise on this record.

2. As to the claim that our statute impinges upon the right of Congress to regulate commerce between the states, we confess our inability to see how this statute of garnishment can be distorted into an attempt of that kind. There is no federal question properly raised in this record.

The judgment is affirmed.

Burgess and Sherwood, JJ., concur.

Garnishment of Common Carriers.

Goods in Transit.—It is well settled that garnishment does not lie against personal property in the custody and possession of a common carrier, though his residence is within the state, if the transit of such property has commenced, and it has been carried outside of the county

or state in which the writ of garnishment is served: Illinois etc. R. R. Co. v. Cobb, 48 Ill. 402; Montrose Pickle Co. v. Dodson etc. Mfg. Co., 76 Iowa, 172; 14 Am. St. Rep. 213; Bates v. Chicago etc. Ry. Co., 60 Wis. 296; 50 Am. Rep. 369; Michigan etc. R. R. Co. v. Chicago etc. R. R. Co., 1 Ill. App. 399; Western R. R. v. Thornton, 60 Ga. 300. The cases which decide this point, however, expressly refrain from deciding whether or not such property is subject to garnishment before its transit actually begins, and the decision reached is usually based upon the reasoning in Illinois etc. R. R. Co. v. Cobb, 48 Ill. 402, 403, which is as follows: "The question is, Can a railway company be held liable to judgment on the process of garnishment, merely on the ground that it may have had property in transitu on its route, consigned to one who may be a debtor at the time of issuing and serving the writs. No case has been cited by the appellees in which such a proceeding has been sustained, and, in the absence of precedent, we should be strongly inclined to hold the companies were not so liable; certainly not out of the county where the property delivered to them for transportation is situate. Any other rule would make railway companies collecting agents of creditors, and that, too, at the risk of these companies. They are common carriers of all kinds of manufactured and agricultural products, having a lien upon the articles delivered for the freightage. They are obliged, under ordinary circumstances, to carry all that shall be delivered to them, and they discharge their duty by carrying and delivering according to contract. It is not their business, nor is it their interest, to know to whom the various articles belong, nor should it be required of them that conflicting claims to the property intrusted to them should be adjusted through controversies. the burden, the annoyance, and the expense of which they must bear. When the goods are in the depot of the railway company, in the county in which the attachment proceedings are instituted, there could, perhaps, be no objection to such process, but on this point we express no definite opinion. When the property has left the county, and is in transit to a distant point, though on the same line of railway, it would be unreasonable to subject the company to the costs, vexation, and trouble of such a process, merely because it had received to be carried that which the law compelled them to receive and carry." This doctrine was controverted in Adams v. Scott, 104 Mass. 164, where it was decided that personal property in the custody of a common carrier was subject to garnishment during the course of its transportation wherever found. The court said: "There is no reason why a common carrier should not thus be liable to the trustee process, in the same manner as other bailees, unless the nature of his contract is such that a judgment charging him as trustee would not protect him against a claim of the defendant for a nondelivery of the goods at their place of destination. But we are of opinion that such judgment would be a sufficient excuse to the trustee for a failure to deliver according to his contract." In Western R. R. v. Thornton, 60 Ga. 300, it was held that the baggage of a railway passenger, accompanying him on his journey from one place to another, was not subject to garnishment under a writ issued outside the county where the baggage was found.

In Pennsylvania R. R. Co. v. People, 31 Ohio St. 537, it was determined that a railroad company, incorporated under the laws of one state, operating a railroad in another state under its laws, is subject to the process of garnishment in the latter state. In this case, no question was made about the possession, by the carrier, of goods present in the latter state. It sought to maintain its position on the basis, that, being a foreign corporation, it was not subject to garnishment. In such case, the property is susceptible of seizure if present, but it cannot be seized if it is not within the jurisdiction of the court issuing the writ of garnishment, and distinct parcels of goods coming into the hands of the garnishee after the service of the writ are not bound by it: Pennsylvania R. R. Co. v. Pennock, 51 Pa. St. 244. A carrier who

receives goods under a contract to forward them to the consignee, and while they are in transit, cannot hold them to answer an attachment as garnishee at the suit of a creditor of the shipper, previously served upon him, nor is he liable in respect to them upon the attachment: *Bingham v. Lamping*, 26 Pa. St. 340; 67 Am. Dec. 418. Nor can he be charged as garnishee of him to whom he has contracted to deliver them: *Clark v. Brewer*, 6 Gray, 320; *Towle v. Wilder*, 57 Vt. 622. A railroad company, after the termination of the transportation of property, and while it is holding it as a warehouseman only, is liable to garnishment in respect to such property; and such garnishment is a sufficient excuse for not delivering the property to the shipper or the consignee: *Cooley v. Minnesota etc. Ry. Co.*, 53 Minn. 327; 39 Am. St. Rep. 608. A railway company is not liable as garnishee, if, at the time of being garnished, it disclosed, by its agent, that as a common carrier, it had in its possession goods consigned to the principal defendant, but did not know whether they belonged to such defendant, and had no personal knowledge of his business or other consignments: *Walker v. Detroit etc. R. R. Co.*, 49 Mich. 446. The right of stoppage in transitu is not impaired or extinguished by service of process of garnishment upon the carrier: *Chicago etc. R. R. Co. v. Painter*, 15 Neb. 394.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

LOEBER v. BUTTE GENERAL ELECTRIC COMPANY.

[16 MONTANA, 1.]

STREETS—TOWNSITE ACT.—The original claimant of a lot in a townsite, entered according to the federal and territorial laws relating thereto, is not the owner in fee of the street or alley upon which his lot abuts.

ELECTRIC LIGHT COMPANIES—SERVITUDE.—A pole used for electric light purposes is within an urban servitude, where it appears that the pole in question is intended to serve public interests.

ELECTRIC LIGHT COMPANIES—ERECTION OF POLES IN STREET.—If an electric light company, under a contract with a city to light its streets and public buildings, finds it necessary, by reason of the existence of telephone poles, and ordinances requiring it to erect new poles throughout the city, to erect one of its poles at the corner of an alley at the rear of plaintiff's premises, it will not be enjoined from so doing, where it does not seriously interfere with access to such property, or with the air or light to it. Such a use of the streets is not unreasonable, and does not substantially interfere with any right of the plaintiff.

Injunction. The plaintiff was the owner of lots 13 and 14 in block 38 in the city of Butte. These lots abutted upon Broadway street, and an alley running through said block. The plaintiff had a saloon building on one of these lots, called the California Brewery, with a rear entrance from the alley. The defendant was under a contract with the city to light the streets and public buildings of the city, and erected an electric light pole in the rear of the saloon about a half foot east of the line of the lots owned by the plaintiff, and about an equal distance south of the line of Broadway. Its position was about in the middle of a sidewalk, three feet wide, in the alley; the rear entrance to plaintiff's property being about twenty feet distant from the pole. The side entrances were thirty and sixty feet distant. The alley

was sixteen feet wide. Directly opposite the rear of plaintiff's premises stood the city hall, a three-story brick building, with an areaway from the basement thereof projecting into the alley. The areaway connected with the city hall prevented the pole from being placed on the opposite side of the alley from the plaintiff's property. The city ordinances of Butte prevented the defendant from erecting poles on the south side of Broadway, because the telephone poles were on that side, and only one line of poles was permitted on each side of a street. The pole was necessary where it was, in order to light the streets, and to relieve the main street of too many wires. The pole could not be placed further down in the alley, because wires from across the street would strike the city hall, and become dangerous, and because such a position would bring the poles closer together than ninety feet, which was prohibited by ordinance. During the process of the construction and erection of the pole the plaintiff enjoined the defendant from further proceedings, and the injunction was made permanent. The defendant said that the pole would have been sunk six feet in the ground but for the injunction, and, if it had been placed as contemplated, it would not have touched the plaintiff's building.

Forbis & Forbis, for the appellant.

5 HUNT, J. By the admission of plaintiff, lots 13 and 14 were included in the townsite of Butte originally filed in the office of the county clerk and recorder of Deer Lodge county, Montana. It was also admitted that the townsite was entered for patent, and patented to the probate judge of Deer Lodge county, Montana, in 1877, under provision of the act of Congress entitled, "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, and the acts of the legislative assembly of the territory of Montana, January 12, 1872, and July 22, 1879. It was further admitted that the townsite was surveyed, and that the alley in question in this action, and lying east of the lots upon which were situated plaintiff's buildings, was embraced and included in the original plat of the townsite, and that the said alley has always been used as a public alley, and that the plaintiff derived title of the lots through the probate judge under the patent of said townsite, and according to the plat thereof. The fee in the alley was therefore originally in the United States. The United States granted it to the trustee of the townsite. The trustee was required by law to see that a survey of the plat was made and filed in the proper office, showing the blocks, lots, streets, and alleys. The streets and

alleys therefore became dedicated to the public use before the conveyance⁶ of the lots to plaintiff or his predecessors: *Hershfield v. Rocky Mountain etc. Teleph. Co.*, 12 Mont. 102.

The plaintiff, therefore, is not the owner in fee of the alley in which the defendant erected its poles. Nor can he complain in this action, if the city of Butte had the power to permit the defendant to erect electric light poles wherewith to light the city, unless, by erecting such poles, an additional or unusual servitude was imposed upon the easement granted by the city. But we think that a pole used for electric light purposes is within an urban servitude, where it appears that the pole in question is intended to serve public interests: *Randolph on Eminent Domain*, sec. 401; *Keasbey on Electric Wires*, sec. 91; *McCormick v. District of Columbia*, 4 Mackey, 396; 54 Am. Rep. 284.

In considering the use of streets where electric railroad poles are erected—and a use for electric light poles should be similarly regarded—the courts sustain, generally, the principle recognized in *Hershfield v. Rocky Mountain etc. Teleph. Co.*, 12 Mont. 102, that “any use of a street which is limited to an exercise of the right of public passage, and which is confined to the mere use of the public easement, whether it be by old methods or new, and which does not tend in any substantial respect to destroy the street as a means of free passage, common to all the people, is perfectly legitimate.” By such uses, the rights of the abutting owners are not invaded. It is simply a user of a right already vested in the public: *Halsey v. Rapid Transit etc. Ry. Co.*, 47 N. J. Eq. 380; *Gay v. Telegraph Co.*, 12 Mo. App. 485.

We fail to see how a pole twelve or fifteen inches in diameter, twenty feet distant from the doorway, can impede free ingress to the rear entrance of plaintiff's beer hall.

The power to light the streets of the city of Butte has been delegated to the municipality by the legislature: *Comp. Stats.* 674. By ordinance of the city council, the defendant was authorized to erect poles throughout the city, and on one side of the street only. Under the authority and permission of the city, the defendant, therefore, properly erected,⁷ or was about to erect, the particular pole complained of, in the alley in the rear of plaintiff's lots.

The testimony establishes the fact that there is no serious interference with the air or light to plaintiff's property, or access thereto. The use of the street for the contemplated purpose is in nowise repugnant to the general use to which streets of cities may be appropriately put in yielding to the necessities for the convenience and comfort of the inhabitants thereof: *Tuttle v. Brush*

etc. Illuminating Co., 50 N. Y. Super. Ct. 464; Hershfield v. Rocky Mountain etc. Teleph. Co., 12 Mont. 102.

The pole was being erected at the most convenient and suitable place. It was necessary to the successful conduct of the defendant's business in lighting the streets of the city. Considering all these facts, the plaintiff cannot complain: Johnson v. Thompson-Houston Electric Co., 7 N. Y. Supp. 716; Keasbey on Electric Wires, sec. 89; Electric Construction Co. v. Hefferman, 12 N. Y. Supp. 336; Lewis on Eminent Domain, sec. 130.

From all the evidence, and the pleadings, and the principles of law applicable thereto, we are of opinion that there was no unreasonable use of the streets by the city, and no substantial interference with any of the rights of plaintiff. A court of equity will not, therefore, interfere.

The judgment of the district court is reversed, and the cause remanded, with direction to dissolve the injunction heretofore granted.

De Witt, J., concurs.

ELECTRIC LIGHT POLES — INJUNCTION — TOWNSITE.—The legislature has no power to permit the erection of poles for electric lighting wires without providing compensation to the owners of premises in front of which the poles are to be placed, where the erection of such poles impairs the use of light, air, and free access; but whether there is a substantial impairment of the use of the easement in front of the premises is a question of fact: Tiffany v. United States Illuminating Co., 67 How. Pr. 73. The erection and maintenance of telephone poles in streets may be restrained by injunction: See monographic notes to Central Union Tel. Co. v. Falley, 10 Am. St. Rep. 131, on the law of the telephone, and Chesapeake etc. Tel. Co. v. Mackenzie, 28 Am. St. Rep. 233, on telegraph and telephone poles and wires in streets and highways and across private property: Contra, Julia Building Assn. v. Bell Teleph. Co., 88 Mo. 258; 57 Am. Rep. 398. But lamp-posts, erected on the streets of a city whose necessities might require its streets to be lighted with oil, gas, or electric lights, do not constitute such an obstruction or impediment to the free use of the street as to demand their removal: Julia Building Assn. v. Bell Teleph. Co., 88 Mo. 258; 57 Am. Rep. 398. Though not expressly so stated, we understand that the owner of an adjacent lot, under the townsite decisions cited below, has simply an easement in the street or alley upon which it is located, and is not the owner of the fee therein: Ashby v. Hall, 119 U. S. 526; Pueblo v. Budd, 19 Col. 588.

ANACONDA MINING COMPANY v. SAILE.

[16 MONTANA, 8.]

JUDGMENT, VACATING FOR EXCUSABLE NEGLIGENCE. It is proper to open a default against a defendant, upon the ground of his excusable negligence, where his attorney was informed by the clerk that no business would be transacted by the court until after a certain date, and, relying upon this statement, he did not appear until such date, when he found that his pending demurrer had been overruled.

JUDGMENT BY DEFAULT, VACATING—TERMS—STATUTE OF LIMITATIONS.—In opening a default against a defendant upon the ground of his excusable negligence, the court commits no error in refusing to impose any terms interfering with his right to interpose the defense of the statute of limitations.

THE STATUTE OF LIMITATIONS is an honorable defense, and one to which all men are entitled as of right.

JUDGMENT BY DEFAULT, VACATING—NEGLIGENCE.—It is not negligent, within the meaning of the law as to defaults, for a defendant's attorney not to withdraw a frivolous demurrer, and file an answer, before the demurrer has been disposed of in the ordinary course of practice.

Ejectment. There was a judgment by default against the defendant, Saile. He had pending, on September 30, 1892, a demurrer to the plaintiff's complaint. His attorney, on that date, was informed by the clerk, that no business would be transacted by the court until after the general election, to be held in the following November. On October 8, 1892, the demurrer was overruled, and the defendant was granted ten days to answer. No answer was filed. Default was entered on October 20th, and judgment was rendered for the plaintiff on November 26th. The defendant's attorney, relying upon the information given him by the clerk, did not appear until after the default, when he moved to set it and the judgment aside, on the ground of mistake, surprise, and excusable neglect. This motion was supported by the affidavit of the defendant's attorney, setting forth the statements of the clerk. An answer was also tendered with the motion, denying the allegations of the complaint, and pleading the statute of limitations. The motion was resisted by the clerk's affidavit, in which he admitted that he had stated to the attorney that there would be no business in the court until after November 14th. He said that he did not state that there would be no motions or demurrers until after November 14th, and did not intend, or suppose, that he was conveying the idea to the attorney that no demurrers would be heard. The plaintiff requested the court, if the default were opened, to impose as a condition, that the defendant should not be allowed to plead the statute of limitations. The court refused to impose this condition, and opened the default, generally, upon payment of costs.

George B. Winston, M. Kirkpatrick, and W. W. Dixon, for the appellant.

F. Adkinson and Brazelton & Scharnikow, for the respondent.

11 DE WITT, J. We are of opinion that the district court did not err in holding that the negligence of defendant was excusable. The defendant alleges—and it is not denied—that the clerk told him on September 30th that there would be no business transacted by the court until November 14th. Hearing a demurrer was business of the court. The clerk modified his statement by saying, further, in his affidavit, that he did not intend to convey the idea that no demurrers would be heard. But the fact is, that he said that no business would be done, and the idea certainly was conveyed to Mr. Adkinson that hearing demurrers was a part of the business which would not be transacted until after November 14th. Long prior to November 14th the demurrer was heard and overruled, and defendant's default entered. We think Adkinson was excusable in relying upon the information which the clerk gave him. The clerk was the ministerial officer of the court. We think that an attorney had perfect right to rely upon the statement of such a court officer that no business would be done until a certain time. It is not as if this information came from a sheriff, or a bailiff, or some attendant upon the court. The clerk had the records of the court, and knew its business. It is not, as suggested by appellant, as if the clerk had told an attorney that the court would take a certain action in a case, that he would overrule or sustain a demurrer, or do some other judicial act. Perhaps an attorney would not be excused in relying upon the statement of the clerk as to some judicial act which the court was to do, but he certainly was justified in relying upon the statement of the clerk simply that no business was to be transacted by the court. We do not think that an attorney could ordinarily be expected to go further, and inquire of the judge as to such a matter, which was surely reasonably within the knowledge of the clerk.

12 This case is readily distinguishable from *Helena v. Brule*, 15 Mont. 429. In that case, the attorney had no apology whatever for his negligence. He simply stated that he was not advised as to the ruling upon his demurrer. It did not appear that it was anyone's duty to advise him.

It has been suggested in this case that defendant's attorney was inexcusably negligent, in that on the 30th of September he did not withdraw his demurrer, and file an answer, for the reason that it appears there was no merit to his demurrer. It is prob-

ably true that the demurrer was not well taken, for, if it had been, defendant would doubtless have appealed from the judgment entered after overruling his demurrer. But we cannot say that it was negligence not to withdraw the demurrer, and file an answer, on September 30th. It certainly is a practice not to be commended to file frivolous demurrers, but no penalty heretofore has ever been imposed by statute or by practice upon such action. We cannot say that, in consideration of the law and practice in that respect, it was negligence not to withdraw an unmeritorious demurrer, as long as the party had the right, under the law, to file it, and have it remain on record until disposed of by an order of the court, in the ordinary course of practice.

Again, it is urged that the court erred in opening the default without imposing the terms that the defendant should not be allowed to plead the statute of limitations. It is argued by appellant that, as the defendant is asking to be relieved from his own negligence, he should not be allowed to hold plaintiff to the results of its negligence by virtue of its not commencing its action within the period of the statute of limitations. But defendant's negligence, we have determined, was excusable, while as to whether the plaintiff's negligence in letting the statute of limitations run was excusable is not a question.

The statute of limitations is a defense to which all men are entitled as a right. The views of courts, since statutes of limitation were first considered, have changed. Originally, it ¹² was regarded as a statute of repose, and not one of presumption. This view changed, and the statute was regarded as one of presumption, and not of repose. The views changed again; the modern doctrine is, that it is a statute of repose: 3 Parsons on Contracts, c. 6. We quote from that chapter as follows: "And at length, through a series of decisions, going to show that the statute is intended for the relief and quiet of defendants, the law reached the conclusion justly and forcibly expressed by Mr. Justice Story in the case to which we have before referred. He says: 'I consider the statute of limitations a highly beneficial statute, and entitled, as such, to receive, if not a liberal, at least a reasonable, construction, in furtherance of its manifest object. It is a statute of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory or death or removal of witnesses. The defense, therefore, which it puts

forth, is an honorable defense, which does not seek to avoid the payment of just claims or demands, admitted now to be due, but which encounters, in the only practicable manner, such as are ancient and unacknowledged, and whatever may have been their original validity, such as are now beyond the power of the party to meet with all the proper vouchers and evidence to repel them. The natural presumption certainly is, that claims which have been long neglected are unfounded, or, at least, are no longer subsisting demands. And this presumption the statute has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors, and guards innocent persons from being betrayed by their ignorance or their overconfidence in regard to transactions which have become dim by age. Yet I well remember the time when courts of law exercised what I cannot but deem a most unseemly anxiety to suppress the defense; and when, to the reproach of the law, almost every effort of ingenuity was exhausted ¹⁴ to catch up loose and inadvertent phrases from the careless lips of the supposed debtor, to construe them into admission of the debt. Happily, that period has passed away; and judges now confine themselves to the more appropriate duty of construing the statute, rather than devising means to evade its operation.' ” The respondent also cites the following cases, which are in point: Freeman on Judgments, 4th ed., sec. 108, citing Ellinger's Appeal, 114 Pa. St. 505; Mitchell v. Campbell, 14 Or. 454; Herman v. Rinker, 106 Pa. St. 121; Sossong v. Rosar, 112 Pa. St. 197; Gourlay v. Hutton, 10 Wend. 595.

We are, therefore, of opinion that the district court exercised a proper discretion in opening this default, and, it so being determined that the negligence of defendant was excusable, he had the right to interpose the defense of the statute of limitations, and the court did not err in refusing to impose the terms that he be not allowed to plead that defense.

The judgment is affirmed.

Pemberton, C. J., and Hunt, J., concur.

JUDGMENTS BY DEFAULT, VACATION OF.—A motion for setting aside a judgment by default, and granting a new trial, upon the ground of surprise or accident, must show the exercise of ordinary diligence to ascertain the facts by which it is claimed the party was surprised or prevented from presenting his case: Note to Williams v. Wescott, 14 Am. St. Rep. 296. If a party and his attorney are in court until informed by the judge that the case will not be tried at that term, whereupon they depart, and a judge pro tem subsequently allows a default, it should be set aside: See monographic note to Burnham v. Hays, 58 Am. Dec. 397, on statutes authorizing the vacation and setting aside of judgments by default.

STATE v. RICKARDS.

[16 MONTANA, 145.]

OFFICERS, DISCRETION OF, IN AWARDING STATE CONTRACTS.—Under a statute directing the state furnishing board to let to the “lowest responsible bidder” a contract for the publication and annotation of the state codes, the contract not to exceed a certain amount, the board, in awarding the contract, has discretionary powers, and it is its duty to wisely and honestly determine the question of responsibility.

STATE CONTRACTS—LOWEST “RESPONSIBLE” BIDDER. The term “responsible,” used in a statutory direction to state officers to let a state contract to the “lowest responsible bidder,” means something more than pecuniary ability. It includes judgment, skill, ability, capacity, and integrity. Hence, officers intrusted with the duty of awarding a state contract to the “lowest responsible bidder” must exercise official discretion in determining the question, and cannot be compelled, by mandamus, to award such a contract to a particular bidder merely upon his assertions of competency and skill, and because he has offered the lowest bid, and tendered a sufficient bond, especially where his facilities for complying with the contract appear to be inadequate.

MANDAMUS cannot issue to control the discretion of officers, unless some abuse thereof is shown.

STATE CONTRACTS, DISCRETION IN AWARDING.—Under a statute directing the state furnishing board to let, to the “lowest responsible bidder,” a contract for the publication and annotation of the state codes, the board does not “wrongfully,” or “arbitrarily,” exercise its discretion by rejecting a bid, although it is the lowest, and is accompanied by an offer of adequate security, where it appears, that bidders exhaustively discussed and explained their bids before the board, as well as their capacity to perform the work; that the board acted with deliberation, and took adjournments to make further inquiries; and that, after considering all the facts and information which it could reasonably be expected to obtain, it determined that the unsuccessful bidder did not have the facilities to do the work.

STATE CONTRACT—WHO IS NOT “INTERESTED.”—The constitutional provision, that no member or officer of any department of the government shall be in any way interested in a contract for public printing, is not violated by awarding a contract for state printing to a publishing company, whose business manager is, at the time, a member of the state legislature, where he has no interest in the profits of the company, but simply receives a fixed salary for his services.

Mandamus to compel Rickards and others, constituting the state furnishing board, to award a contract for printing the codes of Montana to a particular bidder. Eaves and others were the relators. The questions presented for consideration arose upon the return to an alternative writ of mandamus. The state furnishing board, under authority of law, let a contract to the Inter-Mountain Publishing Company for printing, annotating, and binding the codes adopted at the fourth session of the legislative assembly. The constitution of the state required all contracts for the printing, binding, and distribution of laws, etc., to be let to the “lowest responsible bidder.” It further provided that no member or officer of any department of the government should be in any way interested in such contracts. The statute required

the contract in question to be given to the lowest responsible bidder; and required the codes to be annotated by the publisher thereof as fully and completely as Hill's Annotated Statutes and codes of the state of Washington, in so far as annotations from the reports of the supreme court of the state of California were therein contained. The state furnishing board published a notice that they would receive proposals for the printing, binding, publishing, and annotating of the codes, reserving the right to reject any and all bids. Bids were received. The relators, Eaves and others, were the lowest bidders for the contract, by about two hundred and sixty-five dollars. The bid was about eight thousand dollars, and the contract was not to exceed the statutory limit of eight thousand five hundred and fifty-five dollars, with a stated amount for each additional page over two thousand three hundred. The relators offered to execute a good and sufficient bond in the sum of ten thousand dollars, or in any other sum which the board might require. They alleged in their application for the writ that they were experienced publishers, and responsible and capable artisans, engaged in devoting their services, skill, experience, and ability to their business; that they were financially able to procure the services of competent and skillful codifiers and annotators to aid them, and were competent and responsible for the faithful execution of the work in a skillful and workmanlike manner. They further alleged in their affidavit that the Inter-Mountain Publishing Company was disqualified to contract for said work, because, as they were informed and believed, James H. Monteith was a member of said company as a stockholder, and officer therein, and business manager thereof, actively and personally engaged in the management and promotion of the interests of said company, and, as such, was interested in the contract; and that the said James H. Monteith had been and was still a member of the legislature which passed the act for printing, binding, and annotating the codes. The relators further set up that, by virtue of the facts stated, it was the duty of the state furnishing board to award said contract to the relators; and that they demanded that such action be taken by the board, but that, notwithstanding the facts set up, the board "wrongfully, arbitrarily, and in disregard of the duty enjoined upon it," and contrary to the provisions of the constitution and laws, wrongfully resolved and pretended to award said contract to the Inter-Mountain Publishing Company. An alternative writ was issued, commanding the board to convene and revoke the award of the contract to the Inter-Mountain Publishing Company, and award the same to the relators as the lowest responsi-

ble bidders, or to show cause, on April 18th, why they have not done so. The respondents filed a demurrer, and a motion to quash, but a decision was reserved upon the question raised by the motion and demurrer, and the respondents were ordered to file their answer. The answer filed appeared to contain a denial of most of the material allegations of the affidavit, and it seemed that there were raised questions of fact essential to the determination of the matter. The supreme court appointed a referee, and, in the order appointing him, defined the issues upon which he should take testimony in the following language:

1. Was James H. Monteith, mentioned in the affidavit in this case, a stockholder of the Inter-Mountain Publishing Company at the time of the awarding of the contract herein mentioned to the Inter-Mountain Publishing Company, or at any other time mentioned in said affidavit?

2. Is the said James H. Monteith interested, or was he at the time of the letting of the contract interested, in any manner whatever, in the contract awarded as aforesaid to the said Inter-Mountain Publishing Company? If so, how and to what extent?

3. Did the relators, in making their alleged bid, offer to execute or deliver to said board a good and sufficient bond or undertaking, or any bond or undertaking, for the sum mentioned in the affidavit, or any sum, for the performance of the contract?

4. Did the state furnishing board, in awarding the contract in question, make inquiry as to whether the relators were financially able to procure the services of competent and skillful codifiers and annotators, and, if so, what inquiry did they make?

5. Did said board, in letting the said contract, make inquiry as to whether relators were competent or responsible for the performance of the contract in a skillful and workmanlike manner, according to the requirements of law, and, if so, what inquiry was made?

6. Did the board, in awarding the said contract, make inquiry as to whether the relators were able to annotate the said codes as fully and completely as Hill's Annotated Statutes and codes of Washington are annotated, in so far as the reports of the state of California are contained, and, if so, what inquiry was made?

7. Did the said board, in awarding the said contract, make inquiry as to whether relators were capable, and could do, or cause to be done, the typesetting, printing, and binding of the said codes within the state of Montana, or could have published the same as required by law, and, if so, what inquiry was made?

8. Did the state furnishing board, before awarding said contract, meet for the purpose of considering bids submitted to them,

and what examination did they make of said bids? Did they hear relators, and other persons who had presented bids? What inquiry did they make as to the ability and qualification of said bidders to perform the said work? What inquiry did they make as to the responsibility of the several bidders, financially and otherwise? Was the determination of the said board to award the contract to the Inter-Mountain Publishing Company based upon the facts inquired into by them?

A voluminous report was filed by the referee. Counsel argued the law of the case fully upon the motion to quash and the demurrer, and discussed the questions of law and fact after the referee's report was filed.

Wilbur F. Sanders and E. N. Harwood, for the relators.

Henri J. Haskell, William Scallon, and E. S. Booth, for the respondent.

151 DE WITT, J. As we have viewed the case from its inception, there seems to be only two main propositions for the decision of this court: 1. Had the state furnishing board, in awarding this contract, discretionary powers? This is the question of law in the case. 2. If the first proposition be answered in the affirmative, did the board wisely exercise such discretion, or did they, as alleged by the relators, exercise it "wrongfully, arbitrarily, and in disregard of duty?"

We will first address our attention to the question of law. It is true that the relators were the lowest bidders for this contract, and it is probably true that they offered to give a bond for the faithful execution of the same if it were awarded to them, and they allege that they were competent and skillful for the performance of the service. But does this conclude the state furnishing board? Is the offer of the lowest bid and the tendering of a bond sufficient to constitute one the lowest responsible bidder? The authorities do not so hold. The board must let the contract to the lowest responsible bidder. Responsibility includes judgment, skill, ability, capacity, and integrity, and it is the duty of the furnishing board to wisely and honestly determine this question of responsibility.

It is said in Merrill on Mandamus, section 117: "The law generally requires public officers who are charged with letting contracts for public work to accept the lowest bid therefor, and to make the contract accordingly. When such bidder has fully complied on his part with the requirements of the law, he may, by the writ of mandamus, compel the officer to make the contract

with him. The writ has been considered appropriate in relation to a contract for constructing county buildings: *Boren v. Commissioners*, 21 Ohio St. 311; *State v. Board of Commrs.*, ¹⁵² 26 Ohio St. 531; for state printing: *State v. Barnes*, 35 Ohio St. 136; *State v. Printing Commrs.*, 18 Ohio St. 386; *American Clock Co. v. Commissioners*, 31 Ohio St. 415; for articles to be purchased for use of the county for building a bridge: *People v. Commissioners*, 4 Neb. 150; for repairing the Erie Canal: *People v. Contracting Board*, 46 Barb. 254. When the officer is allowed a discretion in the matter, the writ will be refused: *People v. Contracting Board*, 27 N. Y. 378. It has been refused because the officer could decline the bids if he deemed them to be excessive or disadvantageous to the state: *People v. Contracting Board*, 33 N. Y. 382; because the officer was only required to let the contract to the lowest bidder, if he was responsible: *Hoole v. Kinkead*, 16 Nev. 217; or if he furnished adequate security: *People v. Fay*, 3 Lans. 398; because the contract was to be let to the lowest responsible bidder, and the contract in the case required, for its fulfillment, pecuniary ability, judgment, and skill: *Commonwealth v. Mitchell*, 82 Pa. St. 343; and because in the advertisement the right to reject any and all bids was reserved: *Hanlin v. Independent Dist.*, 66 Iowa, 69."

We quote, also, from the following authorities:

It is held in *Douglass v. Commonwealth*, 108 Pa. St. 559, as follows: "In the act of assembly approved May 23, 1874 (Pub. Laws, 233), directing contracts for supplies to be awarded to the lowest responsible bidder, the word 'responsible' does not refer to pecuniary ability only. The act calls for an exercise of discretionary powers on the part of the city officers; and, if they act in good faith, although erroneously or indiscreetly, mandamus will not lie to compel them to change their decision. They may be ordered by mandamus to proceed to do their duty of deciding and acting according to their best judgment, but the court will not direct them in what manner to decide." See, also, *Commonwealth v. Mitchell*, 82 Pa. St. 343, as follows: "The word 'responsible' in the sixth section of the act of the 23d of May, 1874, has a broader meaning than is involved in the ¹⁵³ pecuniary ability to make a good contract by security for its faithful performance, and where the term is applied to contracts requiring for their execution, not only pecuniary ability, but also judgment and skill, the statute imposes, not merely a ministerial duty upon the city authorities, but also duties and powers which are deliberative and discretionary; and, therefore, where these authorities have exercised a discretion, mandamus will not lie to compel them to

modify their decision, even though their action was erroneous, in the absence of clear proof of fraud or bad faith."

It is said in *Kelly v. Chicago*, 62 Ill. 282, as follows: "The complainants have merely submitted a proposal to make a certain contract with the board. How do they found upon that a right to have the board make the contract with them? The notice for proposals expressly reserved the right to reject any bid. The charter did not make it the absolute duty of the board to let the contract to the lowest bidder. It provides that 'all contracts shall be awarded by said board to the lowest reliable and responsible bidder.' These qualities of being reliable and responsible, it is obvious, were of the utmost importance in the construction of a work of this magnitude. And the complainants must have been the possessors of these requisites, as well as being the lowest bidders, to make a case of duty on the part of the board to award the contract to them. It was for the board to determine whether the complainants were reliable and responsible. It exercised its judgment upon the question, and found they were not so, and for that reason awarded the contract to another bidder."

See, also, the following from *Hoole v. Kinkead*, 16 Nev. 220: "Section 5 of the statute referred to provides that 'said board may adopt or reject any and all bids not deemed reasonable or satisfactory, but in determining bids for the same work or material, the lowest responsible bid shall be taken': Laws 1881, p. 59. The provision that they shall take the lowest responsible bid is mandatory, and they had no power or authority to accept any other; but, in ascertaining whether or not ¹⁵⁴ a bidder was responsible, they were required to deliberate and decide, and in doing so they exercised judicial, not ministerial, functions. And, in deciding upon the responsibility of bidders, it was their duty to consider, not only their pecuniary ability to perform the contract, but it was their right and duty to inquire and ascertain which ones, in point of skill, ability, and integrity, would be most likely to do faithful, conscientious work, and fulfill the contract promptly according to its letter and spirit. In *Commissioners v. Mitchell*, 82 Pa. St. 349, a case similar to this, and under a statute requiring a contract for stationery, etc., to be given to the 'lowest responsible bidder,' the court thus forcibly expresses itself: 'It is scarcely open to doubt but that the word under consideration ("responsible"), as used in the statute, means something more than pecuniary ability. In a contract such as the one in controversy, the work must be promptly, faithfully, and well done. It must, or ought to be, conscientious work.

To do such work requires prompt, skillful, and faithful men. A dishonest contractor may impose work upon the city, in spite of the utmost caution of the superintending engineer, apparently good, and even capable of bearing its duty for a time, which in the end may prove to be a total failure, and worse than useless. Granted, that from such a contractor pecuniary damages may be recovered by an action at law. That is, at best, but a last resort, that often produces more vexation than profit—a mere patch upon a bad job; an exceedingly meager compensation, at best, for the delay and incalculable damage resulting to a great city from the want of a competent supply of water. The city requires honest work, not lawsuits. Were we to accept the interpretation insisted upon by the relators, the difference of a single dollar in a bid for the most important contract might determine the question in favor of some unskillful rogue, as against an upright and skillful mechanic. Again, we know that, as a rule, cheap work and cheap workmen are but convertible terms for poor work and poor workmen, and if the city, for the mere sake of cheapness, must put up with these, it is indeed in a most unfortunate position.’”

¹⁵⁵ We take the following from the syllabus of *People v. Dorscheimer*, 55 How. Pr. 118: “It is provided by chapter 634, pages 809, 810, of the laws of 1875, that all contracts for work to be done upon the new capitol shall be awarded to the lowest bona fide responsible bidder or bidders. Held, that the statute requires the successful bidder to be a responsible one—that is, ‘able to respond or to answer in accordance with what is expected or demanded’—in addition to the giving of the bond for the faithful performance of the contract. He is not to be deemed a responsible bidder because he offers adequate security for the performance of the contract. Where the contracting board has passed upon the pecuniary responsibility of a bidder, and rejected his bid because their conclusion was unfavorable to him in that particular, the court will not interfere, so long as there has been no abuse of discretion.”

See, also, remarks of the supreme court of Massachusetts in the case of *Mayo v. County Commissioners*, 141 Mass. 74: “We need not consider whether a private person can maintain a petition for a writ of mandamus to compel public officers to perform their duties, or to direct the manner in which they shall perform them. It is enough for the decision of this case that there has been, on the part of the respondents, no neglect to perform their duty, and no error in the manner in which they have performed it. County commissioners are not required by law to accept the lowest proposal for public works. The statute provides that all

contracts for public works made by them shall, if exceeding three hundred dollars in amount, be made in writing, after notice for proposals therefor has been published at least three times in some newspaper published in the county, city, or town interested in the work: Pub. Stats., c. 22, sec. 22. It does not provide that they shall accept the lowest proposal. It is clearly the intention of the legislature that the county commissioners, after inviting competition by public notice, shall have the authority to make such contract as, in their judgment, the interests of the county require. In the case at bar, the commissioners fully complied with the statute. If, upon examining the various proposals, they were satisfied ¹⁵⁶ that Mayo, the lowest bidder, was an irresponsible person, unfit and incompetent to perform the work proposed, it was their right and duty to reject his proposal, and to make a contract with some other person, such as, in their judgment, was the most advantageous to the county."

Mr. High, in his work on Extraordinary Legal Remedies, after reviewing the Ohio decisions, says: "The better doctrine, however, as to all cases of this nature, and one which has the support of an almost uniform current of authority, is, that the duties of officers intrusted with the letting of contracts for works of public improvement to the lowest bidder are not duties of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond control of the courts by mandamus. And the true theory of all statutes requiring the letting of such contracts to the lowest bidder is, that they are designed for the benefit and protection of the public, rather than for that of the bidders, and that they confer no absolute right upon a bidder to enforce the letting of the contract by mandamus after it has already been awarded to another. In all such cases, the spirit, rather than the strict letter, of the law requiring the work to be let to the lowest bidder, should be kept in view. And where the right of the officers to enter into the contract is itself somewhat doubtful, mandamus will not lie. Nor does the mere issuing of proposals, by officers intrusted with letting contracts, inviting bids for the performance of the work, without binding themselves to award the contract to the lowest bidder, create such an obligation on the part of the officers as to entitle the lowest bidder to the aid of a mandamus to obtain the contract: See, also, *State v. McGrath*, 91 Mo. 386; *Findley v. Pittsburg*, 82 Pa. St. 351; *Madison v. Harbor Board*, 76 Md. 395; *State v. Scott*, 17 Neb. 686; *People v. Contracting Board*, 33 N. Y. 382; High on Extraordinary Legal Remedies, sec. 48; and also the exhaustive

note upon the whole subject found in *Anderson v. Board*, 26 L. R. A. 707.

We quote these authorities simply as to the law as it is applicable ¹⁵⁷ to the case at bar. There are some propositions discussed and decided in them which are not before us, and upon which we do not express an opinion. We are wholly satisfied, from the authorities, that the state furnishing board in this case had discretionary power. It is the intention of the law that the board shall determine who is the lowest responsible bidder.

Before leaving the law of the case, we observe that it is held by many authorities that bidders other than those to whom the contract is awarded, such as relators here, have no standing in court to compel by mandamus the letting of the contract to them: See part of the cases above cited, and *Anderson v. Board*, 26 L. R. A. 707, and cases.

It has also been urgently argued that the affidavit and writ in this case are insufficient, but these, and some other points raised in this case, we prefer to pass, and reserve an opinion thereupon, and to decide the case upon the merits of the facts as returned by the referee. It is a grave and serious matter if a state board, instead of fairly and honestly awarding a contract, act "wrongfully, arbitrarily, and in disregard of their duty," as charged in relators' affidavit, or act through favoritism and for the purpose of usurping state patronage for personal ends, as argued by relators' counsel. If such a wrongful course is taken by a state board, it appears that there is some method of reviewing it by a court. How such action by a board shall be reached by the court is not necessary to determine. The gravity of the charges against the board in this case has led us to pass all preliminary questions in the case, and to enter upon the merits of the facts.

Having determined the question of law, which we noted above as the first matter for consideration, we will now examine the facts and endeavor to ascertain whether the board acted "wrongfully, arbitrarily, and in disregard of duty," or whether they fairly and honestly exercised the discretion vested in them.

In a case which was relied upon by the relators it is said: ¹⁵⁸ "The learned counsel of appellant has directed most of his argument to this question. The argument against the writ is, in substance, that the statute requires the auditor to examine the proceedings, and satisfy himself that they are legal, before signing; and that if he has examined them, and become satisfied that they are not legal, the most that can be said is, that he has committed an error in a matter confided to his discretion, and that

the function of the writ is not to review such exercise of discretion. It must be acknowledged that this argument is exceedingly plausible. There are innumerable cases in which it is laid down that mandamus cannot issue to control discretion.

"The rule, which is undoubtedly correct when properly understood, has been expressed in various forms. It has been repeatedly said that the writ cannot perform the functions of a writ of error; that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions; and that it will issue to compel a tribunal to act in some way, but not in any particular way. These formulas undoubtedly express a truth, but they express it in an inaccurate and misleading manner; and, by reasoning from them as if literally and in all cases true, courts have sometimes been led into error, and have frequently been forced to call acts 'ministerial' which are plainly not so. An examination of the authorities will demonstrate the inaccuracy of the above phrases. Thus it is not accurate to say that the writ will not issue to control discretion; for it is well settled that it may issue to correct an abuse of discretion, if the case is otherwise proper: *Ex parte Bradley*, 7 Wall. 377; *State v. Lafayette County Court*, 41 Mo. 226; *Glencoe v. People*, 78 Ill. 389; *People v. Superior Court*, 10 Wend. 285; *Stockton R. R. Co. v. Stockton*, 51 Cal. 339; *Tapping on Mandamus*, 14," quoted from *Wood v. Strother*, 76 Cal. 545; 9 Am. St. Rep. 252.

Therefore, let us inquire whether there is a showing in this case of an abuse of discretion by the state furnishing board. After the advertisement for bids, the board met to examine the same; present, a full board. The meeting was commenced ¹⁵⁹ April 4th, and continued to April 5th. All the bids were opened by the board in the presence of the bidders. The bidders then discussed and explained their bids, and their capacity to perform the work. In the order of reference, the referee was directed to ascertain what inquiry the board made upon the various points set out in the order of reference. The examination of witnesses by the relators sought to develop as a fact that the board did not themselves ask questions of the different bidders, and therefore did not make inquiry. But the testimony is, that the bidders talked and explained exhaustively. It is a matter of no consequence whether the board obtained their information and facts by asking questions themselves, or whether the information came voluntarily from the persons who possessed the same. In fact, one witness says that at one time the bidders all talked at once, and that the board had nothing to do but to listen.

Mr. Ross, one of the relators, testified that he and his partner, Mr. Eaves, and Mr. Bond and Mr. Monteith, two other bidders, and others, were accorded a full hearing before the board, touching the merits of the several bids submitted, as well as the conditions under which the law required the codes to be printed.

The governor, president of the board, testified that Mr. Eaves, one of the relators, admitted that he had not as good a plant as some of the bidders, but always fell back on the argument that he could give a bond, which, in itself, should be a sufficient guaranty of their ability. The governor says that he had information that the relators were not a well-equipped firm, or capable of doing the work. He says he learned that it was a mechanical impossibility for one publishing house to get out the codes by the 1st of July. He says that Mr. Monteith stated to the board that with the full equipment of the Inter-Mountain Publishing Company it would be a mechanical impossibility for their house to get the codes out without assistance from some other printing house, and that they had entered into an arrangement with a capable printing establishment, ¹⁶⁰ and that with their help it would take all the time given by law to do the work. The governor says that he was satisfied by general information that the business and financial ability of the relators were not such as would guarantee the completion of the work. The governor says that he had no commercial reports as to the relators, but he said, "You know, we get our impression of these things as we get our impression of business men and firms generally." He says that the question of the financial responsibility of the relators was frequently expressed in his office while the matter was pending. He says his information was, that the relators were one of the smallest printing firms in the state, and that he looked at that as he looked at any business proposition. He states that Mr. Eaves said that his firm could bind books, but they had no thorough bindery.

The attorney general says that Mr. Monteith, of the Inter-Mountain Publishing Company, and Mr. Eaves, of the relators, and Mr. Bond, of the Standard Publishing Company, made explanation of their bids, that the board listened, and that questions were propounded, and that the board had a full hearing. The board then adjourned until the next day, for the purpose of inquiring into the ability of the parties to perform the work. They then had before them Judge Wade, and questioned him as to making the annotations. The board heard all the bidders discuss their ability to perform the work, and the conversation was only about the merits of the different bidders. The board paid great

attention to the question of the time in which the work could be gotten out, it being required by law that it should be completed by July 1st. The attorney general says the board considered two propositions: 1. Which of the bidders had the ability to perform the contract; and 2. As to the annotations to be used—and that the bidders furnished the information and the evidence. Mr. Eaves himself says that Mr. Monteith fully explained his bid, and stated that the attorneys of the state desired the Deering annotations, which annotations the Inter-Mountain Publishing Company ¹⁶¹ proposed to give, while the relators proposed to give annotations by Judge Wade and others.

Mr. Monteith, manager of the Inter-Mountain Publishing Company, as a witness, testified before the referee that he had explained his bid, and how it was specific and unequivocal, while the others were ambiguous. He stated that he represented one of the largest printing establishments in the state, and that it would crowd them to complete the work if they entered upon it at once. Mr. Monteith says that the governor, as chairman of the board, stated that the board desired all the information they could get, and that they were arriving at this information through the course of the conversation which they were having at that time. Mr. Monteith said that at the two meetings of the board the chairman stated that they were there for the purpose of hearing the bidders in relation to their bids. Mr. Monteith stated to the board that he had inquired as to the ability of Ross, Frank, and Eaves to perform the labor; that he was informed by printers of Helena that they were incompetent to perform the contract, if awarded to them; that they had no stereotype plant; that they had no bindery, and that the capacity of their press was such that it was inadequate for performing the services; that their financial standing was such that supplies were sent to them with the bill of lading attached to the draft, C. O. D. In the presence of the board, Mr. Bond asked Mr. Eaves if they had a stereotype plant. Mr. Eaves admitted that they had none. Mr. Bond asked him if they had a bindery. Mr. Eaves admitted that they had none. Mr. Eaves admitted that they had not yet made arrangements for a stereotype plant, but they had made arrangements for binding. Mr. Bond testified that Mr. Eaves was heard by the board, and set forth the merits of his bid and his capacity.

We do not propose to recite this testimony any further. It covers two hundred and sixty-three type-written pages, as reported by the referee. The most searching examination was made by able counsel into the acts of the board. While we do not

pass upon the competency ¹⁶² or incompetency of all the testimony introduced before the referee, we are perfectly satisfied that it appears that the state furnishing board made a diligent and careful inquiry into the skill, competency, and ability of both the Inter-Mountain Publishing Company and the relators herein. It appears that they considered all the facts and information which they could reasonably be expected to obtain, and that they acted wisely and discreetly, and not arbitrarily and wrongfully, upon the information before them. To say that the board acted wrongfully and arbitrarily, and in disregard of duty, is wholly unsustained by the evidence. It is to be observed that there was a difference of only two hundred and sixty-five dollars upon a contract of some eight thousand dollars. With this slight difference in figures, and this thorough showing of fair dealing by the board, it would be a remarkable precedent for a court to hold that the action of the board should be disturbed by mandamus. It is to be observed, further, that the board did not act hastily. After a sitting of an hour and a half at the first session, the board adjourned without taking action, for the purpose of making further inquiries, and, upon reassembling, they gave everybody an ample opportunity to be heard.

There is one other matter left for consideration. The relators alleged that the Inter-Mountain Publishing Company is disqualified to receive the award of this contract, because Mr. Monteith was a member of the legislative assembly at all times mentioned in the affidavit, and, as relators are informed and believe, is a member of said publishing company, as a stockholder and officer therein, and business manager thereof, actively engaged in the management and promotion of the interests of said company, and, as such, is interested in the contract.

On the argument made upon the return of the referee's report, relators do not point out to us one syllable of testimony offered by them showing, or tending to show, that Mr. Monteith held a single share of stock in the Inter-Mountain Publishing Company, or that he had one dollar's worth of interest in that concern. Nor have we found such testimony in the report. Upon the contrary, Mr. Monteith testified that he had no interest in the contract, or the proceeds or profits thereof, ¹⁶³ and that he had not even a contingent interest in the profits of the publishing company; that he is paid a fixed salary, and always has been; that the obtaining of the contract would not affect his salary in any way whatever; that he has no interest in the Inter-Mountain Publishing Company, and did not, at any of the times mentioned, own any of its stock. The only showing of Mr. Monteith's connection

with the publishing company is that which was admitted by the pleadings, to wit, that he was and is business manager. But it clearly appears that the obtaining or the losing of this contract would not affect his position as manager, or his salary, in any way whatever.

We have given this case a more lengthy consideration than we at first intended, or perhaps the case deserves. But we have done this by reason of the public character of the acts of the state furnishing board, and by reason of the fact that fairness and honesty must be demanded in the acts of such board; and we believe it a wholesome precedent to inquire closely into the conduct of the board. We have heard the case twice argued, once upon the law and once upon the facts, and we have appointed an able and competent referee to make diligent investigation into the facts. The matter of printing and annotating the codes is a great public enterprise, which should be proceeded with at once, but should not be proceeded with at all, if, as has been intimated, there was fraud, collusion, and arbitrary action by the board. When the time comes that a showing is made of such conduct by the officers of any state institution, and the matter is brought to the attention of this court in a procedure by which it can be reviewed, it will receive a prompt judgment of condemnation.

The writ of mandamus is dismissed.

Pemberton, C. J., and Hunt, J., concur.

MANDAMUS—DISCRETION.—It is not accurate to say that the writ of mandamus will not issue to control discretion; for it is well settled that it may issue to correct an abuse of discretion, if the case is otherwise proper: *Wood v. Strother*, 76 Cal. 545; 9 Am. St. Rep. 249. It does not lie to review the act of an officer when the duty he is called upon to perform requires the exercise of an act of judgment on his part: *Sansom v. Mercer*, 68 Tex. 488; 2 Am. St. Rep. 505; *State v. Barnes*, 25 Fla. 298; 23 Am. St. Rep. 516. The generally accepted rule is, that the courts will not by mandamus compel a municipal corporation to enter into a contract for city printing with one who shows himself merely to have been the lowest bidder in a competition to obtain such a contract. The responsibility of the bidder, his experience, and his facilities for carrying out a contract, may be looked into, and an honest determination, that on the whole his bid will not be in the long run the lowest, is entitled to control: *Times Pub. Co. v. Everett*, 9 Wash. 518, 521; 43 Am. St. Rep. 865, 867.

Responsible Bidders. Who are, and How to Enforce Their Rights.

In many of the states, it is provided, either by constitution or by legislation, that certain contracts or services to be rendered the public, such as public printing, the erection of public buildings, and other kindred works of public improvement, shall be let to the lowest responsible bidder giving adequate security; and the question often arises as to who is the lowest responsible bidder, and how may his rights be enforced. It is clear that if officers and administrative boards, having the power of awarding contracts for public work, were required to act min-

isterially, or in a particular way, the public interests would suffer at the hands of designing and unscrupulous men. On the other hand, it sometimes happens that public officers and administrative boards are oblivious to the interests of the public, and that, if there were no checks upon them, the door to fraud, corruption, and official extravagance would be thrown wide open. The law, therefore, has wisely provided that contracts for public work shall be let to the lowest responsible bidder giving adequate security. This provision, sometimes embodied in constitutions, is mandatory, but it is to be applied according to its spirit, and not literally: *People v. Fay*, 3 Lans. 398. It is the duty of public officers and administrative boards to comply with it: *Hoole v. Kinkead*, 16 Nev. 217; *In re Emigrant etc. Sav. Bank*, 75 N. Y. 388; yet, at the same time, those whose duty it is to let contracts for public work are required, in ascertaining who is the lowest responsible bidder, to deliberate and to decide. Their duties, therefore, are not merely ministerial, but partake of a judicial character, requiring the exercise of discretion: *Hoole v. Kinkead*, 16 Nev. 217; *American etc. Pavement Co. v. Wagner*, 139 Pa. St. 623; *Commonwealth v. Mitchell*, 82 Pa. St. 343.

The public has the right to have the work let to the lowest responsible bidder, for it is interested in the tax to pay for the work: *Brady v. Bartlett*, 56 Cal. 350. Thus, if a city charter requires all contracts for public improvements to be let to the lowest bidder, and one of four bidders on a grading and paving job, whose bid is the lowest, is allowed to withdraw it, because of an alleged mistake in the amount, and the contract is awarded to the next lowest bidder, without readvertisement, it is illegal, and such readvertisement should be ordered by the city council, which has no power to deprive the city, and the parties who would be assessed, of the benefit of a letting to the lowest responsible bidder: *Twiss v. Port Huron*, 63 Mich. 528. The violation of a provision of law requiring the street commissioners of a city to let contracts for city improvements to the lowest bidder must always be regarded, *prima facie* at least, as "affecting the substantial justice of the tax" levied to pay for such an improvement: *Wells v. Burnham*, 20 Wis. 112.

Another thing to be considered in the letting of contracts for public works or improvements is, that it is not the interest of the bidder which is to be guarded. The prime object of consideration is the welfare of the public. Those who have the power to let such contracts must, therefore, exercise their discretion for the benefit of the public; and it must be borne in mind that the administrative discretion they have is that which comes within the law. They have none without or against the law. It follows, therefore, that, in deciding upon the responsibility of bidders, it is the duty of officers and administrative boards to consider the pecuniary ability of bidders to perform the contract, and to ascertain which ones, in point of skill, ability, and integrity would be most likely to do faithful, conscientious work, and to fulfill the terms of the contract. The determination of who is the lowest bidder, with the qualification of responsibility, rests not in the exercise of an arbitrary, unlimited discretion of the officer or board awarding the contract, but upon the exercise of a bona fide judgment, based upon facts tending reasonably to the support of such determination. There must be a rational basis of fact to support such determination: *Hoole v. Kinkead*, 16 Nev. 217; *McGovern v. Board of Public Works*, 57 N. J. L. 580; *Scheffbauer v. Kearney*, 57 N. J. L. 588; *People v. Dorsheimer*, 55 How. Pr. 118. In determining whether a bid is the lowest among several, the quality and utility of the thing offered—its adaptability to the purpose for which it is required—must be first considered: *Cleveland etc. Tel. Co. v. Board of Fire Commrs.*, 55 Barb. 288.

While contracts may originate in advertisements addressed to the general public, the intent manifested by an advertisement must govern in its interpretation. If it is nothing more than a suggestion to induce offers of a contract by others, it imposes, of itself, no liability: *Anderson v. Public Schools*, 122 Mo. 61. In other words, the issuing of a

notice inviting proposals for a public work is not a contract, and does not, of itself, bind the one issuing it to award a contract for the work to the lowest bidder, nor create any obligation on his part to award a contract at all: *Smith v. New York*, 10 N. Y. 504; *People v. Croton Aqueduct Board*, 49 Barb. 259. Neither is the acceptance of the lowest bid a contract. The awarding body may rescind its action and make another award: *Mills Pub. Co. v. Larrabee*, 78 Iowa, 100; *State v. Allen*, 8 Wash. 168. If there is no statutory or constitutional provision requiring contracts for public work to be let to the lowest responsible bidder, they may, of course, be let to one who is not the lowest bidder, so long as the amount to be paid for the work does not exceed the limit fixed for it by law, and a writ of mandamus will not lie to compel an award to the lowest bidder, nor will an injunction lie to restrain the letting of the contract, at legal rates, although other parties are willing, and offer to perform the work for a sum less than the amount fixed by law for doing such work: *Commissioners of Harper County v. State*, 47 Kan. 283; *State v. Dixon County*, 24 Neb. 106; *State v. Lincoln County*, 35 Neb. 346; *Yarnold v. Lawrence*, 15 Kan. 126. So, where the only requirement is, that the contract shall be let on "terms most advantageous to the people of the state," and a discretion is exercised in letting a contract to one who is not the lowest bidder, the latter cannot have a mandamus to compel the award of the contract to him: *Mills Pub. Co. v. Larrabee*, 78 Iowa, 97; *Free Press Assn. v. Nichols*, 45 Vt. 7. But, even where the constitution or some statute does require the work to be let to the lowest responsible bidder giving adequate security, the administrative board whose duty it is to let the contract is not bound to let it to the one whose bid is merely the lowest; and, if it has done so, its action may be reconsidered, before the contract is closed, and the award be made to another. It has a discretion to determine who is "the lowest bidder" and what is "adequate security," and must exercise it to the best of its judgment and for the public interest. When this has been done, mandamus will not lie, in the absence of a clear showing of fraud or bad faith, to compel the award of the contract to one whose bid is merely the lowest in amount: *People v. Croton Aqueduct Board*, 26 Barb. 240; 49 Barb. 259; *Kelly v. Chicago*, 62 Ill. 279; *Commonwealth v. Mitchell*, 82 Pa. St. 343; *People v. Fay*, 3 Lans. 398; *Hoole v. Kinkead*, 16 Nev. 217; *Mayo v. County Commrs.*, 141 Mass. 74; *State v. McGrath*, 91 Mo. 386; *Mills Pub. Co. v. Larrabee*, 78 Iowa, 97; *Weed v. Beach*, 56 How. Pr. 470; *American etc. Pavement Co. v. Wagner*, 139 Pa. St. 623; *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557; *State v. Scott*, 17 Neb. 686; 18 Neb. 597; *State v. Milligan*, 3 Wash. 144; *Times Pub. Co. v. Everett*, 9 Wash. 518; 43 Am. St. Rep. 865; *People v. Dorsheimer*, 55 How. Pr. 118; *State v. Directors*, 5 Ohio St. 234; *Hanlin v. Independent Dist.*, 66 Iowa, 69; *Goss v. State Capitol Commission*, 11 Wash. 474; *State v. Allen*, 8 Wash. 168; *Madison v. Harbor Board*, 76 Md. 395; *Smith v. New York*, 10 N. Y. 504; *State v. Kendall*, 15 Neb. 262; *People v. Aldermen*, 11 Abb. Pr. 289; *People v. Smith*, 12 Abb. Pr. 133.

Thus, by the charter of the city of Chicago, the board of public works was made a distinct branch of the city government, having charge and superintendence of all the public improvements of the city, and the board was required to award all contracts "to the lowest reliable and responsible bidder or bidders." It advertised for sealed proposals for the construction of a new "lake tunnel" of the estimated cost of four hundred thousand dollars, reserving the right to reject any bid for certain causes. The contract was awarded to Steel & McMahon, who were not the lowest bidders. The complainants, whose bid was about four thousand dollars less, filed their bill in equity to restrain the board and Steel & McMahon from entering into the performance of the contract, and to compel the board to award the contract to complainants, also claiming that, as taxpayers, they were entitled to demand the letting of the work to the lowest bidder. The bill was dismissed, and this

decree was, on appeal, held to be correct. The bill, so far as it sought to have the contract awarded to complainants, was in the nature of a mandamus, but that would not lie, as the board was invested with a discretion, that the courts will not, in the absence of fraud or bad faith, seek to control. The complainants did not show any clear legal right to the relief sought; and, with reference to the claim that complainants might suffer injury as taxpayers by an increase of taxation to the amount of four thousand dollars, the difference between the bids, in case the contract was awarded to Steel & McMahon, instead of to the lowest bidder, the court held it to be entirely inadmissible, and said: "Aside from the objection of maintaining such suit, in respect to complainants' rights as taxpayers merely, where their private rights are not peculiarly affected, and the only concern they have in the question belongs to them only as members of the community, we could not look with favor upon a complaint of that amount of added taxation, caused for the purpose of securing honest and competent contractors in a work of such character and magnitude, where an act of incompetency or unfaithfulness in the performance of the contract might easily bring upon the city losses which, in comparison, would dwarf the sum complained of into insignificance": *Kelly v. Chicago*, 62 Ill. 279. The same principle applies where a mandamus is sought to compel the board of public lands and buildings to accept the "highest" bid for the leasing of certain school lands. The writ will be denied, unless it is clear that there has been an abuse of discretion, and that the sum bid is the full rental value of the land: *State v. Scott*, 17 Neb. 686; 18 Neb. 597; and, if a party at a public letting of educational lands is the highest bidder, but afterward refuses to accept the lease and pay the amount due thereon, and perform the contract on his part, the board will not be compelled, by mandamus, to accept a lower bid afterward made by him for the same tract of land: *State v. Scott*, 18 Neb. 597.

Under a law requiring an award of a contract for public work to be given to "the lowest bidder, who will give adequate security," a lower bidder who has given the security required is not entitled to a mandamus, after an award of the contract has actually been made to another party: *People v. Contracting Board*, 27 N. Y. 378; *Talbot Paving Co. v. Common Council*, 91 Mich. 262; *Weed v. Beach*, 56 How. Pr. 470; *State v. Board of Education*, 24 Wis. 683; *State v. Commissioners of Printing*, 18 Ohio St. 386. *Contra*, *Boran v. Commissioners*, 21 Ohio St. 311, holding that where county commissioners refuse to award a contract for labor and materials to the person entitled thereto, he may enforce against them such award by mandamus, although they have made an unauthorized award to other parties, provided the party entitled thereto has done nothing to waive his right, and has used reasonable diligence in asserting it.

The expression, "lowest bidder," necessarily implies a common standard by which to measure the respective bids, and, in some cases, that common standard must necessarily be previously prepared specifications, freely accessible to all competitors for the contract, upon which alone their respective bids are to be based, the intent of the law being to secure to the public the advantage of fair and just competition between bidders, and, at the same time, to prevent favoritism and fraud in every form: *Mazet v. Pittsburgh*, 137 Pa. St. 548. The term "lowest bidder" is not to be construed literally: *Cleveland etc. Tel. Co. v. Board of Fire Commrs.*, 55 Barb. 288. The word "responsible" has a broader meaning than is involved in the pecuniary ability to make a good contract by security for its faithful performance, and where the term is applied to contracts, requiring for their execution, not only pecuniary ability, but also judgment and skill, the duties and powers of those awarding such contracts to the lowest responsible bidder are more than ministerial. They are deliberative and discretionary: *Commonwealth v. Mitchell*, 82 Pa. St. 343. Such is the reasoning of all, or nearly all, of the decisions upon the subject. While, theoretically, it is not easily answerable, we think that its result is to de-

prive the statutory and constitutional provisions upon the subject of their proper efficiency, and to enable boards and other local tribunals to practice practical politics under the pretense of exercising their discretion. These provisions, doubtless, were the result of a widespread belief that the public was being defrauded through the awarding of contracts at sums grossly disproportionate to the fair value of the work done or materials furnished; and it was hoped that this might be avoided by requiring public notice to be given of proposed contracts, for which the public would be invited to compete, and that, as a result of this, competition might be excited, and contracts awarded to persons who were willing to perform them according to the plans and specifications at the most reasonable terms. If, however, the courts are to hold that the word "responsible," as used in these provisions, does not refer to pecuniary responsibility alone, and that the board awarding the contract may consider numerous other matters of which there is no accurate measure, then it is clear that the board may award the contract at whatsoever price it pleases, on the ground that it regards the person whom it favors as being especially competent, or as having some other qualification which, in its discretion, it regards as peculiarly valuable.

The officer or board letting the contract is also to determine what is adequate security. Proposals for a contract, requiring as security the certificate of a bank that it holds a deposit of four thousand dollars, "in cash," are satisfied by a certificate of the deposit of four thousand dollars, without further specification: *People v. Contracting Board*, 27 N. Y. 378. Where a city invites bids for earth excavation, upon the basis of estimates made by a surveyor, who makes an error therein, the lowest bidder under the estimates is the lowest bidder under the law, and where he has complied with the law, and performed the work, he does not lose his right of action against the city because the estimates were erroneous, and may recover, so long as he did nothing to mislead or deceive the city, and practiced no fraud, although the bidder knew that the estimates were incorrect, and the contract, as awarded, cost the city nearly twice the actual value of the work. The bidder had a right to the benefit of his own knowledge honestly acquired, and the city cannot urge against him its own ignorance or error: *Reilly v. Mayor*, 111 N. Y. 473.

An officer or administrative board letting a contract may reserve the right to reject any and all bids: *People v. Croton Aqueduct Board*, 49 Barb. 259; and, though it is the rule to let "to the lowest and best bidder," the contract, under such a reservation, may be awarded to one who is not the lowest bidder, and the latter has no cause of action: *Hanlin v. Independent Dist.*, 66 Iowa, 69; *State v. Directors*, 5 Ohio St. 234; although the contract was let "arbitrarily and capriciously, and through favoritism": *Anderson v. Public Schools*, 122 Mo. 61. The act of bidding in response to an advertisement containing an express reservation of the right "to reject any or all bids," is, of itself, a consent to this reserved right, and concludes the bidder from any attempt to enforce the acceptance of his bid because it is the lowest: *Keogh v. Mayor*, 4 Del. Ch. 491. The bids may, also, be rejected altogether, without such a reservation, where they are extravagant, or far beyond the amount of the contemplated expenditure: *People v. Croton Aqueduct Board*, 49 Barb. 259. The legislative provision in relation to contracts by the city of New York, requiring that all contracts "shall be awarded to the lowest bidder for the same with adequate security, and every such contract shall be deemed confirmed in and to such lowest bidder at the time of the opening of the bids, estimates, or proposals therefor, and such contract shall be forthwith duly executed with such lowest bidder," does not compel the making of a contract by the city with such lowest bidder. While no contract can be let to one not the lowest bidder, the body awarding the contract, acting in good faith, may refuse to award it to him, if they deem it for the best interest of the city to do so. It may reject all the bids and

readvertise: *Walsh v. Mayor*, 113 N. Y. 142; *Goss v. State Capitol Commission*, 11 Wash. 474; *American etc. Pavement Co. v. Wagner*, 139 Pa. St. 623; especially where it is authorized by statute to do so: *Goss v. State Capitol Commission*, 11 Wash. 474; but a statute authorizing the rejection of all bids does not authorize the acceptance of any "but the lowest responsible bid": *State v. Board of Education*, 42 Ohio St. 374. State officers having endeavored to obtain bids in a certain form, and failed, are at liberty, as against such faulty bidders, to examine all, and, according to their best judgment, award the contract to the lowest bidder: *Weed v. Beach*, 56 How. Pr. 470. Compare *McBrain v. Grand Rapids*, 56 Mich. 95. A contracting board is not bound to accept a palpably deceptive bid: *People v. Contracting Board*, 83 N. Y. 382. But such a board has no power to allow a bid to be privately amended, so as to make it better than another, and acceptable to the board: *State v. Douglas County*, 11 Neb. 484; *Dickinson v. Poughkeepsie*, 75 N. Y. 65. The lowest bidder must file his bond, etc., when required; and, if he fails to do so, the contract may be let to the next lowest bidder, in the discretion of the contracting board: *State v. Board of Commrs.*, 26 Ohio St. 531; *State v. Allen*, 8 Wash. 168; but, in such a case, the next lowest bidder is not entitled to a writ of mandamus to compel an award of the contract to himself: *State v. Commissioners*, 36 Ohio St. 326. Where the notice of letting a contract is defective or insufficient, the remedy is not by mandamus: *American Clock Co. v. Commissioners*, 31 Ohio St. 415. A statute requiring contracts for the improvement of roads to be let to the lowest responsible bidder includes bridges and culverts: *Follmer v. Nuckolls County*, 6 Neb. 204.

As mandamus will not lie to compel the award of a contract for public work to one who is merely the lowest bidder in amount, so an injunction will not lie to restrain the award of the contract to another, about to be made in good faith, and in a manner which, according to the judgment and discretion of the body letting it, will best subserve the public interests: *Kelly v. Chicago*, 62 Ill. 279; *Mills Pub. Co. v. Larrabee*, 78 Iowa, 97; *Findley v. Pittsburgh*, 82 Pa. St. 351; *State v. Milligan*, 3 Wash. 144; *Times Pub. Co. v. Everett*, 9 Wash. 518; 43 Am. St. Rep. 865; *Goss v. State Capitol Commission*, 11 Wash. 474; *Keogh v. Mayor*, 4 Del. Ch. 491; *Dibble v. New Haven*, 56 Conn. 199; *Wiggins v. Philadelphia*, 2 Brewst. 444; *May v. Detroit*, 2 Mich. N. P. 235.

The exercise of an "honest discretion" in making a contract ought not to be interfered with by injunction; and a city will not be enjoined against awarding a contract to a higher bidder, where the complainant has violated the terms of the ordinance inviting the bids: *Wiggins v. Philadelphia*, 2 Brewst. 444. If the charter of a particular city requires its council to "annually let the public printing to the lowest and best bidder," and makes it "the duty of the council, after having let the contract for the city printing, to designate the newspaper published by the party receiving said contract as the official newspaper of said city," this does not compel the city council to let the contract for the city printing to the lowest and best bidder who is at the time the publisher of a newspaper; nor does it forbid their letting the contract to one who, at the time of the bidding, is not the publisher of a newspaper. The discretion is especially conferred upon the council, and upon no other tribunal, of determining who is the lowest and best bidder. So, where the action of a city council is authorized by law, and it acts within the limits of the discretion conferred upon it by such law, a court of equity will not enjoin its action: *State v. Milligan*, 3 Wash. 144. At the same time, while there may be some discretion of a judicial character reposed in a city council for determining what is the lowest and best bid, under a statute requiring a contract for city advertising to be let to the lowest bidder, yet, in order to prevent interference by injunction, the council should judicially find the facts which, in its judgment, render the apparently lowest bid not the lowest and best in fact: *Times Pub. Co. v. Everett*, 9 Wash. 518; 43 Am. St. Rep. 865. Where a discretionary power is conferred, by statute, upon a board of state capitol

commissioners, to reject all bids called for by them for the construction of a state capitol building, the courts are not warranted in interfering by injunction. upon the rejection of all bids and the issuance of a new call prescribing different conditions: *Goss v. State Capitol Commission*, 11 Wash. 474.

The determination of who is the lowest and best bidder on a contract cannot, where there is a rational basis of fact to support such determination, be set aside on certiorari: *McGovern v. Board of Public Works*, 57 N. J. L. 580; *Schefbauer v. Kearney*, 57 N. J. L. 588. Thus, under the laws of New Jersey, the board of township committee, in the exercise of the power of lighting the streets of a township, is not bound to award a contract, where the street lighting is done by contract, to the lowest bidder for such work, but they are bound to exercise the power in a bona fide manner, and with reasonable discretion and judgment, for the benefit of the township, basing such reasonable discretion upon a rational basis of fact in its support. When the determination of the board is upheld by such rational basis of fact, the court will not decide disputed facts or weigh evidence in order to review the action of the board in awarding contracts of the class in question: *Schefbauer v. Kearney*, 57 N. J. L. 589; *McGovern v. Board of Public Works*, 57 N. J. L. 580.

The lowest bidder, in amount, has sometimes sought recourse in an action for damages caused by the rejection of his bid, and the award of the contract to another. But, as a general rule, a public officer is not responsible, in a civil suit, for a judicial determination, however erroneous it may be, or however malicious even the motive which produced it. And, as municipal officers act in a quasi judicial capacity in determining who is "the lowest responsible bidder giving adequate security," they come within this rule. The duty they owe is a public duty to the city or people at large, not to the one claiming to be the lowest bidder. They do not act for the benefit of individuals, or the protection of private interests; and are not, therefore, liable to a civil suit at the instance of an individual. There is no individual liability. That such actions are not maintainable, see *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557; *Walsh v. Mayor*, 113 N. Y. 142; *Smith v. New York*, 10 N. Y. 504; *American Pavement Co. v. Wagner*, 139 Pa. St. 623.

What is said above concerning the remedy of the "lowest bidder" by mandamus, injunction, certiorari, or an action for damages, shows that, until the contract is closed with him, he has, ordinarily, no remedy, where the contract has been awarded to another, in the exercise of an "honest discretion," by the body having the power to let it. He is not legally entitled to the contract until it is legally awarded to him: *American Pavement Co. v. Wagner*, 139 Pa. St. 623; *People v. Croton Aqueduct Board*, 26 Barb. 240; *Mills Pub. Co. v. Larrabee*, 78 Iowa, 97; *Keogh v. Mayor*, 4 Del. Ch. 491; *May v. Detroit*, 2 Mich. N. P. 235. The court may guard the public interests against any corrupt or fraudulent abuse of the powers granted to cities or their officers; but where no private right is infringed in awarding a contract or public work, and the city or its officers exercise their discretion in good faith, a court will not revise the grounds of their proceedings, nor entertain the suggestion that their action is inexpedient for the public interest: *Keogh v. Mayor*, 4 Del. Ch. 491.

The writ of mandamus, in cases of the kind under consideration, is denied where the right to award the contract is doubtful: *People v. Fay*, 3 Lans. 398. It does not lie to compel action to be taken on a bid, by accepting or rejecting it. It does not lie to compel an officer to make a contract, binding upon the city, county, or state: *People v. Canal Board*, 13 Barb. 432; *People v. Croton Aqueduct Board*, 49 Barb. 259; *Times Pub. Co. v. Everett*, 9 Wash. 518; 43 Am. St. Rep. 865; *State v. Allen*, 8 Wash. 168; and will, of course, be denied where the relator is not, within the meaning of the statute, the lowest bidder: *State v. Commissioners*, 20 Ohio St. 425. One is not entitled to the

writ to have a contract awarded to him as being the lowest bidder until he shows that he has complied with the law. Thus, where it is perfectly apparent that the legislature intended the work of annotating, printing, binding, and publishing the revised statutes should be done in the shortest time that was practicable for the performance of so important an undertaking, the party asking for a mandamus to award a contract to him for doing the work, as being the lowest and best bidder, must show that all the requirements of the law under which the proposal for the contract was made have been substantially complied with: *State v. Barnes*, 35 Ohio St. 136. The party asking for the writ must show a clear legal right in himself: *State v. Board of Education*, 42 Ohio St. 374. The only acts which a court can control by it are those which are purely ministerial. It will not issue to direct judgment or to control discretion: *State v. Kendall*, 15 Neb. 262. It will issue to compel boards or officers to act with respect to the letting of a contract, and to do their duty by deciding and acting according to their best judgment, but a court cannot direct them in what manner to decide: *Douglass v. Commonwealth*, 108 Pa. St. 559; *Commonwealth v. Mitchell*, 82 Pa. St. 343; *Hoole v. Kinkead*, 16 Nev. 217; *State v. McGrath*, 91 Mo. 386.

Notwithstanding the restricted rights and remedies of the lowest bidder for a contract for public work, and the wide range of discretion granted to officers and boards in whom the function of awarding such contracts is lodged, there are cases, occasionally occurring, in which a mandamus may be issued to compel such functionaries to perform their duty in letting a contract to the lowest bidder who is a responsible party, and whose bid is formal and regular, and in which an injunction may be issued to restrain an award of the contract to another: *State v. Commissioners*, 39 Ohio St. 188; *Times Pub. Co. v. Everett*, 9 Wash. 518; 43 Am. St. Rep. 865; *People v. Contracting Board*, 46 Barb. 254. It is the duty of such officers to let such contracts to "the lowest and best bidder," unless, in the interest of the public, they determine to reject all bids: *State v. Commissioners*, 39 Ohio St. 188; *American Pavement Co. v. Wagner*, 139 Pa. St. 623; *Connolly v. Board of Freeholders*, 57 N. J. L. 286; and bidders should be informed as to what time the bids will be opened, so that they may be present and see that the contract is awarded to the lowest bidder as the law provides: *People v. Board of State Auditors*, 42 Mich. 422. The discretion of the officers must be exercised in a "reasonable manner," and it is unreasonable to reject the lowest bid on false information without giving the bidder a hearing to put them in possession of the real facts. Mandamus is properly awarded in such a case: *State v. Commissioners*, 39 Ohio St. 188; *Connolly v. Board of Freeholders*, 57 N. J. L. 286. If a contract for public work has been awarded without sufficient legal cause to another than the lowest bidder, a court of equity may enjoin its execution, especially if the act was accompanied by evidence of bad faith and unfairness: *American Pavement Co. v. Wagner*, 139 Pa. St. 623. So, if though fraud or manifest error, not within the discretion confided to the agents of a municipal corporation, they are proceeding to make a contract which will illegally cast upon taxpayers a substantially larger burden of expense than is necessary, the courts will interfere by injunction for the purpose of restricting their action within legal bounds: *Times Pub. Co. v. Everett*, 9 Wash. 518; 43 Am. St. Rep. 865. Again, a contract may be awarded and executed under such circumstances as to make it void. Thus, county commissioners have no authority to require each bidder for the erection of a bridge to accompany his bid with his own plans and specifications, they adopting such plans as they see fit, and accepting the bid accompanying the same without giving others an opportunity to bid on such plans. Such conduct opens the door to corruption, favoritism, and fraud. A contract awarded on such a letting is void. But, in such a case, where there is no valid basis on which bids could be received, no valid contract can be founded thereon, and a lower bidder cannot have a mandamus for the purpose of having the

contract awarded to him: *People v. Commissioners*, 4 Neb. 150. Any other contract than one "to the lowest bidder who shall give due security," upon public notice of proposals, is wholly unauthorized and void. For instance, if proposals are advertised for, and received by, water commissioners, and one of the competitors is permitted by the engineer, to whom the proposals are referred for calculation and comparison, to alter his bid so as to make it appear lower than that of the others, and then, after acceptance of this bid, a contract is made at higher prices, with a large number of prices stipulated for therein not in the competition at all, and with a material clause inserted for the benefit of the contractor, and in no manner contemplated by, or offered to, the other bidders, the contract is unauthorized and void. Its execution does not confer upon the contractor any right of action thereunder, and no recovery can be had upon a quantum meruit: *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *State v. Douglas County*, 11 Neb. 484.

So, where a city charter provided that all work done involving an expenditure of more than a certain amount should be, by contract, let "to the lowest responsible bidder giving adequate security," and there were seven bidders for a contract for such work, five of whom were lower than the relator's, in mandamus proceedings brought to compel the mayor of the city to draw his warrant on the city treasurer for an amount audited by the common council, and it appeared that the common council passed a resolution awarding the contract over the mayor's veto, which was based on the ground that the relator's bid was higher than "that of another responsible party," and no question or objection was ever raised, at any time, that the lower bids were not formal and regular, or made by responsible parties, it was held that the contract was illegal and void; that the relator could not recover for the work, and was not entitled to a writ; and that nothing was added to the validity of the relator's claim by the audit and allowance thereof, as that body exceeded their powers in doing so: *People v. Gleason*, 121 N. Y. 631.

The owner of property to be assessed for street improvement is entitled to have the work done by the lowest responsible bidder, upon a fair bidding, unaffected by any act, device, or machination of the bidder to whom the contract may be awarded, or any person in collusion with him. Hence, where one makes a private contract with owners of land to be so assessed, that he will do the work at a specified rate, in lieu of the rate to be awarded in a contract which he expects to obtain for doing street work, and he does become the successful bidder for the work, the arrangement is a fraud upon the other owners, vitiates the assessment, and renders it a nullity: *Brady v. Bartlett*, 56 Cal. 350. Mandamus will issue in favor of the assignee of the lowest responsible bidder to allow him to complete a contract, as for publishing state volumes of law reports: *Banks v. De Witt*, 42 Ohio St. 268.

LEGGATT v. PRIDEAUX.

[16 MONTANA, 205.]

TORTS.—THE RULE AS TO WRONGS IS, that in acts mala in se, the intent governs, but in those mala prohibita, the only inquiry is, Has the law been violated?

JUSTICE OF THE PEACE—EXCESSIVE FEES.—A justice of the peace who demands and receives excessive fees is liable in an action for the statutory penalty therefor; and it is no defense that he had no corrupt motive or intent in collecting them; or that he was ignorant of the fact that the fees were illegal; or that, upon discovery of his extortion, he tendered back the fees; or that the person paying them knew that they were excessive, and kept silent. The question as to voluntary payment, in such a case, is immaterial.

Action to recover the statutory penalty for collecting illegal fees. The action was brought under a statute allowing the plaintiff to recover ten times the amount of fees, not specifically provided for by law, demanded and received of him. The defendant admitted the excessive charges, but relied upon defenses, the nature of which appear from the opinion. The plaintiff's reply denied any tender of the amount of illegal fees. Counter-motions for judgment on the pleadings were made. The court sustained the defendant's motions, and granted judgment, dismissed the plaintiff's complaint, and awarded costs to the defendant. The action of the court in sustaining the defendant's motion for judgment was assigned as error.

W. S. Barbour and Smith & Word, for the appellants.

Cullen & Toole, for the respondent.

207 HUNT, J. The first question presented is, whether a justice of the peace, who collects fees exceeding those allowed him by law, is liable in a civil action for a penalty of ten times the amount of such fees, without regard to any corrupt motive or intent in collecting them. The facts of this case show an admitted violation of the letter of the law, and a prima facie liability under its provisions: *Lydick v. Palmquist*, 31 Neb. 300.

That the justice of the peace believed he had a legal right to charge the fees he did, and acted in good faith in taxing and collecting the fees, constitute no defense. It would be most dangerous to the welfare of society if an officer elected to administer the law could violate it to his own pecuniary advantage, and escape the consequences of his act by pleading ignorance of the statute he had violated.

That ignorance of the law is no excuse is a postulate of law, but, unless the maxim is upheld, there would be innumerable problems presented to courts, and he who knew the least might

fare the best; or, as is said by the supreme court of California (People v. O'Brien, 96 Cal. 171), "the denser the ignorance the greater would be the exemption from liability."

The case is not one where there was a mistake of fact. The ²⁰⁸ court of appeals of New York in Gardner v. People, 62 N. Y. 299, say: "Such mistakes do not excuse the commission of prohibited acts. The rule on the subject appears to be, that in acts mala in se the intent governs, but in those mala prohibita, the only inquiry is, has the law been violated?" People v. Brooks, 1 Denio, 457; 43 Am. Dec. 704; Beckham v. Nacke, 56 Mo. 546; Commonwealth v. Emmons, 98 Mass. 6; Carr v. Trainor, 36 Ill. App. 587; Roberge v. Burnham, 124 Mass. 277; People v. Monk, 8 Utah, 35.

The receiving of the illegal fees is the gist of the wrong under the statute, and, when such fees are deliberately accepted, the law is violated, and the liability attaches.

No less eminent a judge than Chief Justice Gibson of Pennsylvania, in an early case (Coates v. Wallace, 17 Serg. & R. 75), wherein a justice of the peace was sued for a penalty in having exacted illegal fees, wrote as follows: "The penalty imposed by this act may be incurred by exacting fees which are supposed at the times to be legally demandable. By the very words of the prohibitory clause, the taking is the gist of the offense. Ignorance of the law will not excuse in any case; and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him with an unusual attention to clearness and precision. On any other principle, a conviction would seldom take place, even in cases of the most flagrant abuse, for pretexts would never be wanting. Sound policy, therefore, requires that the officer should be held to act at his peril; and we are of opinion that the absence of a corrupt motive, or the existence of an agreement by the party injured, furnishes no justification for doing what the law forbids."

The case of State v. Gardner, 5 Nev. 377, relied upon by respondent, was a criminal action, where the defendant, who confessedly had no criminal intent, was indicted and convicted of a felony in violating a law for improperly issuing licenses. ²⁰⁹ A majority of the court held that a criminal intent was a necessary ingredient of the offense charged, which was a felony, not a misdemeanor. And the opinion, when scrutinized, is based upon

the ground that, in considering the fearful consequences imposed, if a mere violation of the letter of the law would necessitate a conviction, it was impossible to believe that the general rules of the criminal law requiring an evil intent were to be ignored. The case, therefore, differs from the one at bar. We note, too, that the Nevada ruling is not generally approved of. The court of appeals of New York, in criticising the opinion, say: "It is evident that a majority of the court struggled to relieve the defendant from a harsh punishment for a comparatively innocent act": *Gardner v. People*, 62 N. Y. 299. The supreme court of California also decline to follow it: *People v. O'Brien*, 96 Cal. 171.

The defense of the silence of the appellant, Leggatt, in not informing respondent of the fact that his fees as justice were excessive, cannot obtain. The very statement of the proposition, that an unsuccessful litigant is bound to advise the justice who had decided against him what the law is, illustrates the absurdity of the contention.

The respondent next argues that a tender back, when he discovered his error, should relieve him. We cannot agree with him. To so hold would be to practically nullify the whole object of the law, by permitting officials who violate its provisions to escape the consequences by refunding, when their extortions were detected, or when they believed they were about to be detected. The effect would be to say to officials, "You may charge and retain all the illegal fees you can collect, and if, by chance, you are discovered in taxing illegal sums, you need only refund to avoid all penalties for your errors or wrongs." This would not do: *Turner v. Blount*, 49 Ark. 361.

Finally, respondent says that the payment of the excessive fees by the appellant was a voluntary one, and, for that reason, he cannot prevail in this suit. We seriously doubt the correctness of the contention, that a payment is voluntarily made ²¹⁰ where a judgment is rendered and costs are taxed against a party to a suit, and paid by him in obedience to a demand by the justice who rendered the judgment, and who alone could issue process to enforce its collection: *American S. S. Co. v. Young*, 89 Pa. St. 186; 33 Am. Rep. 748; *Insurance Co. v. Britton*, 8 Bosw. 148-155; *McKee v. Campbell*, 27 Mich. 497. It is unnecessary to pass on the question, however, because we think the doctrine of voluntary payment is not properly applicable to this case. The statute, of itself, is too plain a guide. The respondent, a justice of the peace, demanded and received excessive fees. The law

was explicit in fixing his compensation, but he violated it. The same statute which fixed his fees said to him, "If you violate this law by receiving illegal and excessive fees, the person who pays them to you may recover ten times the sum so paid to you; primarily as a penalty upon you, and incidentally as a remedy to him": *Lane v. State*, 47 N. J. L. 362.

We find nothing in the answer which demands any further construction of the statute, the main objects of which are to prevent extortion and imposition. The respondent pleads no fraud or deception on the appellant's part, except that, in order to bring this suit, appellant kept silent, and did not advise him what the law was. But, as said before, there is no obligation upon a litigant to advise a magistrate what his official fees are. He is naturally expected and bound to know them himself; and, where his charges exceed the amount the law allows him, he cannot escape the statutory responsibilities imposed, either because his extortion was the result of his ignorance, or because the victim of his extortion was more learned, yet failed to counsel him upon the law. It is possible that the enforcement of the penalty in this case is a hardship, and it may be that the severity of the law is great; but with those matters we have not to do. The policy upon which the statute is founded is none the less wholesome; and while, in administering the law, cases occasionally arise which, under certain circumstances, constrain courts to render harsh judgments, yet, in the lapse of time, a due respect for the rigid²¹¹ maintenance of sound principles will prevent the growth of systems of great wrong to the public generally.

Being of the opinion that, as the pleadings stood when the counter-motions were made, the plaintiff was entitled to judgment, it follows that the judgment of the district court must be reversed, and it is so ordered.

Pemberton, C. J., and De Witt, J., concur.

OFFICERS—COLLECTION OF ILLEGAL FEES. — For the payment of illegal fees exacted *colore officii*, an action lies to recover back the money, as having been involuntarily paid: See monographic note to *Mayor of Baltimore v. Lefferman*, 45 Am. Dec. 167, on compulsory payment. Sound policy requires that an officer, in taking illegal fees, should be held to act at his peril. Hence, the absence of a corrupt intent is no defense to an action against an officer for a statutory penalty for taking illegal fees: *Cobbey v. Burks*, 11 Neb. 157; 38 Am. Rep. 364.

HOLLENBACK v. DINGWELL.

[16 MONTANA, 335.]

NEGLIGENCE, CONTRIBUTORY.—THE TWO ESSENTIAL ELEMENTS in contributory negligence are a want of ordinary care on the part of the plaintiff, and a causal connection between that and the injury complained of; the rule being, that a plaintiff cannot recover damages for an injury he has sustained, if the injury could have been avoided by the exercise of ordinary care on his part.

NEGLIGENCE, CONTRIBUTORY, BREAKING OF DAM—DAMAGES.—Though one lives on a stream below a dangerous dam, and has knowledge of its condition, his failure to institute statutory proceedings to have it judicially examined, and made secure, or abated as a nuisance, is not contributory negligence, and does not defeat his right to recover damages resulting from its subsequent breaking.

Action for damages. The plaintiff, Hollenback, obtained judgment below. The defendants' motion for a new trial was denied, and they appealed.

Cole & Whitehill and Cullen & Toole, for the appellants.

Rogers & Rogers and W. H. Trippet, for the respondent.

³³⁶ HUNT, J. The plaintiff, a ranchman living on Griff creek, sues the defendants for negligently constructing and maintaining a dam used to store quantities of water at the outlet of Griff Lake about four and one-half miles above plaintiff's ranch. In June, 1892, the dam broke away, and the body of water behind it ran down upon plaintiff's farm, washing away the soil, destroying the buildings, tearing up his fences and crops, and ³³⁷ generally doing him great damage. The jury awarded the plaintiff damages in the sum of twelve hundred dollars. The defendants moved for a new trial, and appeal from the order denying said motion.

The defendants do not contend in this court that the plaintiff was not injured by the breaking away of the dam, nor is there any question raised of the justness of the amount awarded, provided the plaintiff could recover at all, so that we need only consider the single point presented—whether the verdict of the jury is against the law.

The court, after charging the jury upon the law of negligence, and as to the measure of care necessary to be exercised on the part of defendants, instructed as follows: "The jury are instructed that the plaintiff had a right, without incurring liability for trespass, under the laws of the state of Montana, to have said dam examined and declared a nuisance, and to have had the same abated, without costs to him, if the same was dangerous to life or property by reason of its negligent construction, or any other defect therein,

whereby the same was unsafe or dangerous to life or property situate or being upon the stream below it. And if you believe from the evidence in this case that the plaintiff, for a year, or a longer period, immediately prior to the breaking of said dam, had the opportunity to know that said dam was in a dangerous and unsafe condition, and that he believed it was dangerous and unsafe, then it was his duty, as an ordinarily careful, prudent, and discreet man, to have invoked the law of the state, and have had said dam examined, and, if found unsafe, to have had it removed, or the nuisance abated, so as to prevent said injury and damages to his property, as the law makes it the duty of a person who has the means or opportunity of avoiding an injury, without committing a trespass upon the property of another, to take the proper measures to abate the nuisance and prevent the threatened injury and damages, and, if he fails to do so, he is guilty of contributory negligence, and cannot recover."

The law of the state referred to in the instruction is the act ~~328~~ of February 16, 1877, concerning dams and reservoirs: Comp. Stats., div. 5, c. 56. By the provisions of the law just cited, persons constructing or using dams or reservoirs are required to build them in a substantial manner, so that they will safely and securely hold waters, if, upon the stream upon which any such dam or reservoir is situated, and below the same, there are settlers whose lives may be endangered, or valuable property which may be damaged or destroyed, by the breaking of such dam or reservoir and the escape of the waters therefrom. It is further provided by said law that if anyone makes a complaint to the effect that any person is filling a dam or reservoir, and that life or property is or will be thereby endangered, the district judge shall appoint three persons to examine the dam or reservoir, and determine as to its security. These persons shall report to the district judge. If they find that it is imminently dangerous, they are empowered to draw the waters from the reservoir, to insure the safety of the persons and property below the same, or, if they find it insecure, but not imminently dangerous, they shall report their finding to the district judge, who is required to cause a copy of said finding to be served on the owners of the dam, with a notice to proceed forthwith to make the dam secure, or to draw the water without delay, and that unless the owner comply with the notice, or shall show that the dam is secure, or that no property or life would be endangered by its giving away, it shall be the duty of the district judge to issue a writ commanding the sheriff to draw from said dam the waters thereof. The hearing provided for shall be before a jury of twelve. An appeal may be

taken upon giving to the persons holding property on said stream, below said dam, security against loss or damage resulting from the bursting of said dam or reservoir. The person making complaint of the insecurity of the dam shall, in the first instance, advance the necessary expenses of the jurors, and their fees, which sums may be recovered when judgment is rendered. Any person guilty of erecting or maintaining a dam or reservoir which endangers life or property in the manner provided ³³⁹ for in the chapter referred to shall be deemed guilty of erecting or maintaining a nuisance, and, being thereof convicted, shall be punished as provided by law.

It is admitted that plaintiff did not institute any proceeding, under this statute or otherwise, to have the dam declared dangerous, or a nuisance to the public. The jury, therefore, by finding for the plaintiff, utterly disregarded the particular instruction quoted above.

In passing upon the motion for a new trial, however, the learned judge of the district court permitted the verdict to stand, entirely changing his view of the law as given in the first instance, thereby holding that an omission to invoke the aid of the statutory right to have the safety of the dam inquired into by judicial proceeding was not an act of negligence on plaintiff's part, which so far (if at all) contributed to the overflow of his farm as to preclude him from obtaining relief in this action.

The appellants do not ask the court to reverse the case upon the question of practice—that because the jury confessedly disregarded the law as given to them by the court, whether right or wrong, a new trial should be had—but rely upon the ground that the instruction, as given, was the law, and that the jury, under the plain facts in evidence, disobeyed the law when they awarded plaintiff damages, it being an undisputed fact that he had never complied with the provisions of the statute authorizing complaint to be made before the district court. But it appears clear to us that the statutes which authorized proceedings to have a dam examined, to determine its safety or danger, and to try that issue, simply declare a permission and right, and prescribe how the same may be availed of, without imposing any legal duty whatever: *Texas etc. R. R. Co. v. Young*, 60 Tex. 201. Surely, to maintain a dam which imperils the safety of many people is a nuisance; hence, the right to have the same abated was in the plaintiff, whether conferred by statutory authority or by the common law: *Wood on Nuisances*, sec. 3; *Mayor v. Bailey*, 2 Denio, 433.

³⁴⁰ A method was fixed by statute by which inquiry could

be had into the construction of the work, for the purpose, evidently, of laying down a plain, certain, and expeditious procedure, capable of being summarily invoked by one who considered himself or his property in great or imminent peril. But we cannot believe that a compliance with the method is a condition precedent to maintaining a suit in negligence for the breaking of the dam. Plaintiff simply omitted to invoke a special proceeding, whereby suspicion of great danger might be acted upon by following a statute, and advancing fees and costs as a guarantee of good faith. How can it be said that plaintiff was guilty of negligence at all, or how could such omission be said to be the juridical cause of the breaking of the dam? "The negligence of plaintiff," says Wharton on Negligence, section 324, "to make it a juridical cause, must be such that, by the usual course of events, it would result, unless independent disturbing moral agencies intervene, in the particular injury. It may be negligence in me to cross a railroad on a level, when, by going a mile round, I could cross on a bridge. Yet this negligence, in case I am struck by a train, is not the juridical cause of the collision, if I keep a good lookout when I reach the road. I may negligently leave my goods in a warehouse, but this is not the juridical cause of their destruction, if such destruction comes, not as a natural and usual result of my negligence, but through the negligence of another, who sets fire to the warehouse." The defendants' dam did not overflow and break because the plaintiff omitted to complain of its construction before the district judge; that is, there is a total lack of connection of cause and effect necessary to be established to justify the argument that plaintiff contributed to his own damage: Shearman and Redfield on Negligence, sec. 25; Thompson on Negligence, 1151.

It is beyond dispute that defendants were in duty bound to use all reasonable care to maintain their dam in a safe and suitable condition, with relation to its uses and to the safety of life and property of others below them on the creek: Angel on Watercourses, sec. 336; Cooley on Torts, 570; Gray v. ³⁴¹ Harris, 107 Mass. 492; 9 Am. Rep. 61. And it was a breach of this duty that caused the plaintiff's damage, without any act of omission on plaintiff's part, amounting to a want of ordinary care, which produced the breaking or overflow. "The two essential elements in contributory negligence are a want of ordinary care on the part of the plaintiff, and a causal connection between that and the injury complained of; the rule being, that a plaintiff cannot recover damages for an injury he has sustained, if the injury could

have been avoided by the exercise of ordinary care on his part": Beach on Contributory Negligence, sec. 9.

Plaintiff did all that could be reasonably expected of him. He notified the defendants of the condition of their dam. He had a perfect right to live upon the creek, and it would be highly unreasonable to require him to repair a defectively constructed dam belonging to others, and for the defectiveness of which he was in nowise responsible. It would likewise be a bad precedent to exonerate the defendants, otherwise clearly negligent, because a settler below them did not avail himself of the statutes quoted, which, as we have said, were a permission expressly accorded to him, but certainly never were intended to shield those who were careless, from liability in damages for the consequences of negligently maintaining a fearful danger to those lawfully occupying their homes below the point of such danger.

These views render it unnecessary to discuss principles which might be applicable if plaintiff was a transgressor himself, seeking to hold defendants liable for their negligent acts.

The judgment is affirmed.

Pemberton, C. J., and De Witt, J., concur.

CONTRIBUTORY NEGLIGENCE AS A DEFENSE.—If the plaintiff, in the ordinary exercise of his own rights, allows his property to be in an exposed and hazardous position, and it becomes injured, by the neglect of ordinary care and caution on the part of the defendant, he is entitled to reparation, for the reason that although, by allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by mere accident, he did not thereby discharge the defendant from the duty of observing ordinary care and prudence, or, in other words, voluntarily incur the risk of injury by the negligence of another: See monographic note to *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; 30 Am. Rep. 190, on when contributory negligence is a defense.

KING v. MILES CITY IRRIGATING DITCH COMPANY.

[16 MONTANA, 463.]

IRRIGATION—NEGLIGENCE IN CONSTRUCTING DITCH—INSTRUCTIONS.—It is error to instruct the jury, in an action for damages, caused by the breaking of the defendant's irrigating ditch, that "it is incumbent upon the defendant to construct its flumes and ditches in such a reasonable and prudent manner as that no damage shall result to the person whose lands are crossed by the ditch." The defendant is thus held not only to the highest degree of care, but is made an insurer against all damages, without regard to the question of negligence.

Action for damages. The defendant's motion for a new trial was granted, and the plaintiff appealed.

Middleton & Light, for the appellant.

Strevell & Porter, for the respondent.

⁴⁶³ DE WITT, J. This action was brought by the plaintiff to recover damages caused to his ranch by the breaking of the defendant's irrigating ditch. The cause of action, as alleged, and sought to be proved, was the negligence of defendant in the construction and operation of its ditch, by reason of which the same broke and damaged the plaintiff. On a trial to a jury, a verdict was rendered for the plaintiff. This verdict was, by the court, set aside, on motion for a new trial. From this order the plaintiff appeals.

The motion was made upon two grounds: 1. The insufficiency of the evidence to sustain the verdict; and 2. Errors of law. It does not appear upon which ground, or whether upon both, the motion was granted.

The principal error of law complained of was, that the court instructed the jury, among other things, as follows: "In this connection, the court further instructs the jury that it is incumbent upon the defendant company to construct its flumes and ditches in such a reasonable and prudent manner as that ⁴⁶⁴ no damage shall result to the person whose lands are crossed by the ditch." This instruction was clearly erroneous. The court undertook to lay down the measure of reasonable and prudent conduct on the part of the defendant. The court did not instruct that the care by the defendant should be either ordinary or extraordinary, but, on the other hand, instructed the jury that the degree of care should be such that no damage should result. The defendant was thus held, not only to the highest and most extraordinary degree of care, but was held to exercise such care that the plaintiff would not suffer any damage. In other words, the instruction made the defendant absolutely an insurer against all damages. It removed the question of negligence from the jury altogether, and practically instructed them that, if the damage occurred, the defendant was liable, without regard to its negligence. This, of course, was error, which error the district court properly corrected in granting the motion for a new trial, and on this ground the order granting the new trial must be affirmed: *Hopkins v. Butte etc. Co.*, 13 Mont. 223; 40 Am. St. Rep. 438.

On the motion for a new trial, the court also had before it the question of insufficiency of the evidence to sustain the verdict. Upon a reading of the testimony in the case, we are not prepared to say that the court abused its discretion if it granted the new trial on this ground. We are not prepared to go further, how-

ever, and to say, from our point of view, that there was absolutely no showing of negligence which should have gone to the jury. There seem to be a few items of evidence tending to show negligence. Whether these were sufficient to justify the verdict is more properly a question in the sound discretion of the district court, who saw the witnesses and heard them testify. As remarked, we cannot find any abuse of discretion in granting the new trial on the ground of insufficiency of the evidence. To express any further views upon this subject we do not deem appropriate.

The order granting the motion for new trial is affirmed.

Pemberton, C. J., and Hunt, J., concurred.

DAMAGES—FAILURE TO KEEP DITCH IN REPAIR.—The measure of damages for failure to keep a ditch in repair is the money actually paid out to keep such ditch in repair, which was rendered necessary by defendant's failure to keep it in repair: Note to Van Winkle v. Wilkins, 12 Am. St. Rep. 304.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY v. MONTANA UNION RAILWAY COMPANY.

[16 MONTANA, 504.]

EMINENT DOMAIN—PUBLIC USE.—If, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material, in applying the doctrine of eminent domain.

CHARACTER OF WAY, HOW DETERMINED.—The character of a way, whether it is public or private, is determined, under the law of eminent domain, by the extent of the right to use it, and not by the extent to which that right is exercised.

PUBLIC WAY, WHAT IS.—If all the people have the right to use a way, it is a public way, within the law of eminent domain, although the number who have occasion to exercise the right is very small.

RAILROADS—"MORE NECESSARY PUBLIC USE."—Under an express constitutional command that all railroads shall be public highways and common carriers, a railroad built by a private corporation, with its main line and branches, or spurs, run within convenient contiguity of private mines or orehouses, is a public use, and may exercise the right of eminent domain for a use authorized by law, when the ground taken is necessary to such use, and where, if the ground is already taken, the public use to which it is to be applied is a "more necessary public use."

RAILROADS—MINING—PUBLIC USE.—In a state where mining is the dominant industry, the magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad to construct lateral branches, tracks, and spurs to mines and mining works, as public uses, under the law of eminent domain.

EMINENT DOMAIN—LIMITATION UPON THE RIGHT.—The power to take the property of private citizens or corporations for public use must be exercised, and can be exercised, only so far as the authority extends, either in terms expressed by the law itself, or by implication, clear and satisfactory.

EMINENT DOMAIN — CORPORATIONS — ACTUAL USE.—One corporation cannot take the lands or franchises of another in actual use by it, unless authorized to do so by the legislature; but its lands not in actual use may be taken by another corporation, authorized to take lands for its use in invitum, whenever the lands of an individual may be taken, and there is a necessity therefor; and opposing corporations may be limited to the enjoyment of that property in actual use by them, and that which is reasonably necessary for the safe, proper, and convenient management of their business, and the accomplishment of the purposes of their creation.

EMINENT DOMAIN — PUBLIC USE — NECESSITY, WHEN SHOWN.—One railroad may exercise the right of eminent domain as to part of the right of way, not in actual use, of another railroad, when there is a necessity therefor; and such necessity is shown where the right of way of the existing road is twenty-five feet on each side of the center of its track, which runs along the side of a mountain, but which is only graded a little more than necessary for the actual space occupied by its roadbed; and another road, seeking the same objective point for the purpose of hauling ore from mines on the mountain asks to have condemned the adjacent portion of the right of way on the upper hillside, which is not used, and cannot be used, without heavy excavation work; where, by the abrupt rise in the mountain, and its rocky character, it is necessary for the one road to cross divers spurs of the other, which necessity requires both roads to be on the same level, and which can be obviated only by requiring the incoming road to go under the other, which would be unreasonable and impracticable, or to construct its road high enough to go overhead, which would require it to run into the mountain, at enormous expense, and switch back, in order to reach the objective points of the two roads; and where, by running higher up the mountain, the route would materially interfere with the operation of mines, while, by going upon the existing right of way, the incoming road would merely widen the cuts existing, causing no material damage, and leave a space of from seventeen to twenty-two feet between the centers of the tracks. It is no tenable objection to such condemnation that the occupancy of the incoming road would make it more difficult for the existing road to throw out switches or sidetracks above it, or make it more difficult for it to handle ties, there being a distance of twenty-two feet between the centers of the tracks, enough room for another track, and, if the elevation of the incoming road is too high to prevent the existing road from crossing it at right angles with such switches or sidetrack, a spur can be run, at any distance, in order to attain the proper elevation. Neither can it be successfully urged that the right of way taken by the incoming road is necessary in case of future double tracks or sidings, as these needs are mere future possibilities, not based on reasonably apparent traffic needs. Nor, in view of the express provision of the constitution giving one railroad the right to cross another, will the fact that the existing road may be inconvenienced in the operation of its trains at the various crossings proposed, constitute any objection to the occupancy of the incoming road.

WHAT IS A "MORE NECESSARY PUBLIC USE."—Under a statute providing, that before property already appropriated to some public use may be again taken, it must appear that the public use to which it is to be applied is a "more necessary public use," it is not necessary that the new public use should, in all cases, be a "different" public use. Hence, if a railroad traversing the side of a mountain in a mining section has within its right of way tracts of ground not necessary to the proper, successful, and safe operation of its system of tracks and spurs, and not used by it in connection with any such operations, and in all reasonable probability not necessary for any such future use, and another road, in seeking the same objective points, is obliged to take part of such unused right of way to avoid a considerably more circuitous route, at a different grade, of very much greater cost, and of serious dam-

age to many mining properties, and would, in any event, be obliged to parallel the adversary road a part of the way, the use, under such conditions, of the unused parts of the right of way of the one company by the other is a "more necessary public use" than that to which such unused portions are already appropriated.

EMINENT DOMAIN.—THE WORD "NECESSARY," as used in a statute permitting lands appropriated for a public use by a railroad company to be again taken for a "more necessary public use," does not mean an absolute necessity for the particular location sought, but a reasonable necessity, founded upon the practicability, economy, facilities, and other considerations which should govern the determination of what the necessities may be, always considering the rights of the senior company, yet never forgetting the benefits to the public.

RAILROADS — CROSSINGS — LONGITUDINAL TAKING.—Under a statute providing that all rights of way shall be subject to be connected with, crossed, or intersected by any right of way, and that they shall also be subject to a limited use in common with the owner thereof when necessary, it seems that the right of a railroad to condemn a portion of the right of way of another railroad, not in actual use, is not limited to crossings or intersections only, but extends to a longitudinal taking.

EMINENT DOMAIN—RAILWAY CROSSINGS—CONDITIONS. If one railroad seeks to condemn a part of the right of way of another, used for hauling ore from certain mines, and a spur of the existing road, used for a particular mine, is on the north side of its track, while the mine is on the south side, and the grade of the plaintiff's track is above the grade of the spur at the point of crossing, the court will, if it would be more convenient for the existing road to have the spur on the south side of its main track, order the incoming road, at its own expense, to rebuild the spur already constructed, upon the south side of the existing main track, and provide suitable approaches to it for teams.

EMINENT DOMAIN—RAILWAY CROSSINGS — DIFFERENCE OF GRADES.—If one railroad seeks to cross another, there being a slight difference of elevation of grades of the two roads at the crossing of a spur of the existing road, and the only practicable way of crossing is to raise the grade of the spur from the switch to the point of intersection, the court will order the crossing to be so made, at the expense of the incoming road.

EMINENT DOMAIN—RAILWAY CROSSINGS—"HUMP."—If one railroad seeks to cross the spur of another railroad on a mountainside without raising the grade of the latter's track, and finds it necessary to construct a reverse grade, which makes a "hump," that is, an uphill and a downhill grade, which may be dangerous and liable to obstruct the track of the existing road with wreckage in case the trains of the incoming road break in two at that point, the court will not, where the evidence of skilled engineers as to the feasibility of the crossing is conflicting, disturb the crossing as so constructed, as the court cannot determine the probable effect of the "hump."

EMINENT DOMAIN—RAILWAY CROSSINGS—DAMAGES. In condemnation proceedings by one railroad company to obtain parts of the right of way of another, the question of damages for crossings is properly referred to commissioners, where the statute authorizes it.

EMINENT DOMAIN—CROSSINGS—WATCHMEN.—If the employment of a watchman is rendered necessary by one railroad crossing another, the former should be allowed to select the watchman, but should be required to bear his expense.

Action by the Butte, Anaconda & Pacific Railway Company to condemn portions of the right of way of the Montana Union Railway Company. The plaintiff and defendant were incorpo-

rated under the laws of Montana. There were other defendants organized under the laws of other states. The railroads were on a mountainside, at a place called "Butte Hill," in a mining region, and their principal object was to haul ores from, and supplies to, the several quartz mines indicated upon the map. A part of the right of way of the Montana Union Railway Company had never been used by it for railroad purposes for the several years during which the road had been constructed and in operation, and was not reasonably requisite for future uses. The Butte, Anaconda & Pacific Railway Company, in the location of its only really practicable route, desired to take parts of such unused portions of the Montana Union right of way, such portions being necessary for their actual use, and unnecessary for the actual use of the Montana Union. The plaintiff alleged its right to construct railways; that the public interest required the railway in question; that it was necessary to take certain portions of the Montana Union's right of way; that, in its construction, it was necessary to cross and intersect the Montana Union Railway; that there were about twelve of these crossings—one at the Modock mine; one over the spur leading to the Anaconda orehouse, marked B on the map; one over the spur leading to the Anaconda orehouse, marked C on the map; one over the spur leading to the Gagnon mining claim, marked D; one over the Haggin spur, marked E; one over the Buffalo spur, marked F; one over the spur leading to the Mountain Consolidated mine, marked G; one over the spur leading to the Green Mountain and Wake Up Jim orehouses, marked H; one over the spur leading to the orehouse of the High Ore mine, marked I; one over the Haggin spur, leading to the High Ore mine orehouse, marked J; one over the spur leading from the Haggin spur to the boilerhouse of the Anaconda mine, marked K; and another over the Haggin spur, near the timber shop at the Anaconda mine, marked L.

The plaintiff alleged that the use for which it sought to condemn the property, and to which the property was to be applied by the plaintiff, was a "more necessary public use" than any use to which the defendants could put the lands; that the various crossings and intersections proposed were to be made in the manner most compatible with the greatest public benefit, and the least private injury to the defendants; and that as proposed, the crossings would not, in any way, interfere with the use, operation, or enjoyment by the defendants of their railway lines. The complaint contained an accurate description of the lands which the plaintiff wished to use for right of way purposes. The plain-

tiff further alleged that it had been unable to agree with the defendants as to the amount of compensation to be paid for the taking of the premises described, and the construction of crossings, and that the interest in the premises sought to be condemned for the plaintiff's use was only an easement for a right of way for the construction, maintenance, and operation of its railway. The complaint prayed for a judgment that the use for which the plaintiff sought to appropriate the premises was a "public use"; that the public interests required the construction of the plaintiff's railway; that the lands, and the crossings proposed to be made, were necessary for the purpose of said railway; that the plaintiff had a right to appropriate the premises and make the crossings; that the court ascertain the defendants' interest in the premises described and sought to be condemned; that an order be made appointing three competent and disinterested persons as commissioners to assess the damages by reason of the appropriation of the said property; that on the coming in of the report of the commissioners, the court make such order in regard to the possession of said property sought to be condemned as might be proper; and that, as to the crossings, the court adjudge, regulate, and determine the place and manner of making the same.

Except as to the allegation of the plaintiff's right, under its charter, to construct railroads, the answer denied the averments of the complaint, and alleged that the ground sought to be condemned was absolutely necessary to the defendants for railroad purposes; that the desired right of way was not indispensable to the use of said plaintiff; that it sought such appropriation to save the cost of acquiring a right of way for itself; that the proposed construction by plaintiff would be of irreparable damage to the defendants; that by a slight increase of cost, plaintiff could avoid all the crossings; that it was not necessary that the crossings should be laid as contemplated by the plaintiff; that the plaintiff had no right to enter upon the right of way or roadbed of defendants, except for necessary crossings or connections; and that therefore the plaintiff had no right of condemnation over the right of way of these defendants.

The replication of the plaintiff denied these affirmative allegations of the answer. The cause was tried before the court, without a jury, and voluminous testimony was taken. There was a judgment for the plaintiff. The judgment and order of the court, after its more formal recitals, set forth that the judge of the district court, with a civil engineer chosen by each party, inspected the premises before the submission of the case. It

was then decided that the use for which the property described in the complaint was sought was a public use; that the entire quantity sought to be appropriated ought so to be taken; that the appropriation thereof would not be detrimental to the public interest or welfare, and was required and necessary for the proper prosecution of the enterprise for which it was sought to be appropriated; that the public interest required the prosecution of the plaintiff's said enterprise; that the premises so sought to be appropriated by the plaintiff were not necessary for the use of the defendant's railway, nor for any public use, and were not in actual use by them; that the use for which the plaintiff sought to condemn the premises, and to which they were to be applied by the plaintiff, was a "more necessary public use" than any use to which the defendants had or could put said lands; that the right sought to be obtained was an easement for railroad purposes; and that the crossings and intersections described by the plaintiff were necessary and proper. Three competent and disinterested persons, Clinton C. Clark, Justin Butler, and C. J. Stevenson, were appointed commissioners to ascertain and determine damages.

After expressly granting the right to cross over the defendants' spur known as the "Gagnon Spur," on the Clear Grit claim, the court made the following proviso: "Provided, however, the defendants may, and if they do, within ten days after the date hereof, give notice in writing to the plaintiff, that they consent to the plaintiff's taking up their entire Gagnon spur aforesaid, and placing and rebuilding the same on the south side of the defendants' main track, opposite, or about opposite, its present position, then, in that case, the plaintiff shall, at its own expense, and within a reasonable time after the giving of said notice, remove and place and rebuild the said spur on the south side of the defendant's main track, opposite, or nearly opposite, its present position, and make the same convenient to approach by and for teams and wagons, and provide proper approaches thereto; and provided further, that if such consent be not given within the time and in the manner aforesaid, then the plaintiff may and shall extend its road across such spur at the present grade of the plaintiff's road, and the plaintiff shall not be obliged to put in any crossing, and, in such case, the defendants, if they desire to operate said spur or use the same, shall make the same conform to the grade of plaintiff's road and track, and put in a crossing at the grade of plaintiff's track, and maintain the same, all at their own expense."

The court also ordered that the plaintiff might cross the defendant's spur known as the "Buffalo Spur" at an angle of 16 degrees, 48 minutes. Concerning this spur, the court added: "Provided, however, that the defendants may, and if they do, within ten days from the date of this order, notify the plaintiff in writing that they consent to permit the plaintiff to raise the entire grade of the said Buffalo spur, so that the plaintiff can cross the same at its own grade, then, in that event, the plaintiff shall, before making said crossing, raise the grade of the whole of said spur, at its own expense, so as to make a feasible crossing with its road, and leave said spur in a reasonable condition for the use of the defendants; and provided further, that if the defendants do not give such consent within the said time and in the said manner, the plaintiff shall make said crossing at its own grade, in as reasonably safe manner as the same can be done without raising the grade of the entire Buffalo spur aforesaid."

Other facts sufficiently appear in the opinion. There being a judgment for the plaintiff, the defendants moved for a new trial, which was denied, and an appeal was taken both from the judgment and the order overruling the motion for a new trial. The following is a copy of the plat introduced on the trial. (See next page.)

Shropshire & Burleigh and Forbis & Forbis, for the appellants.

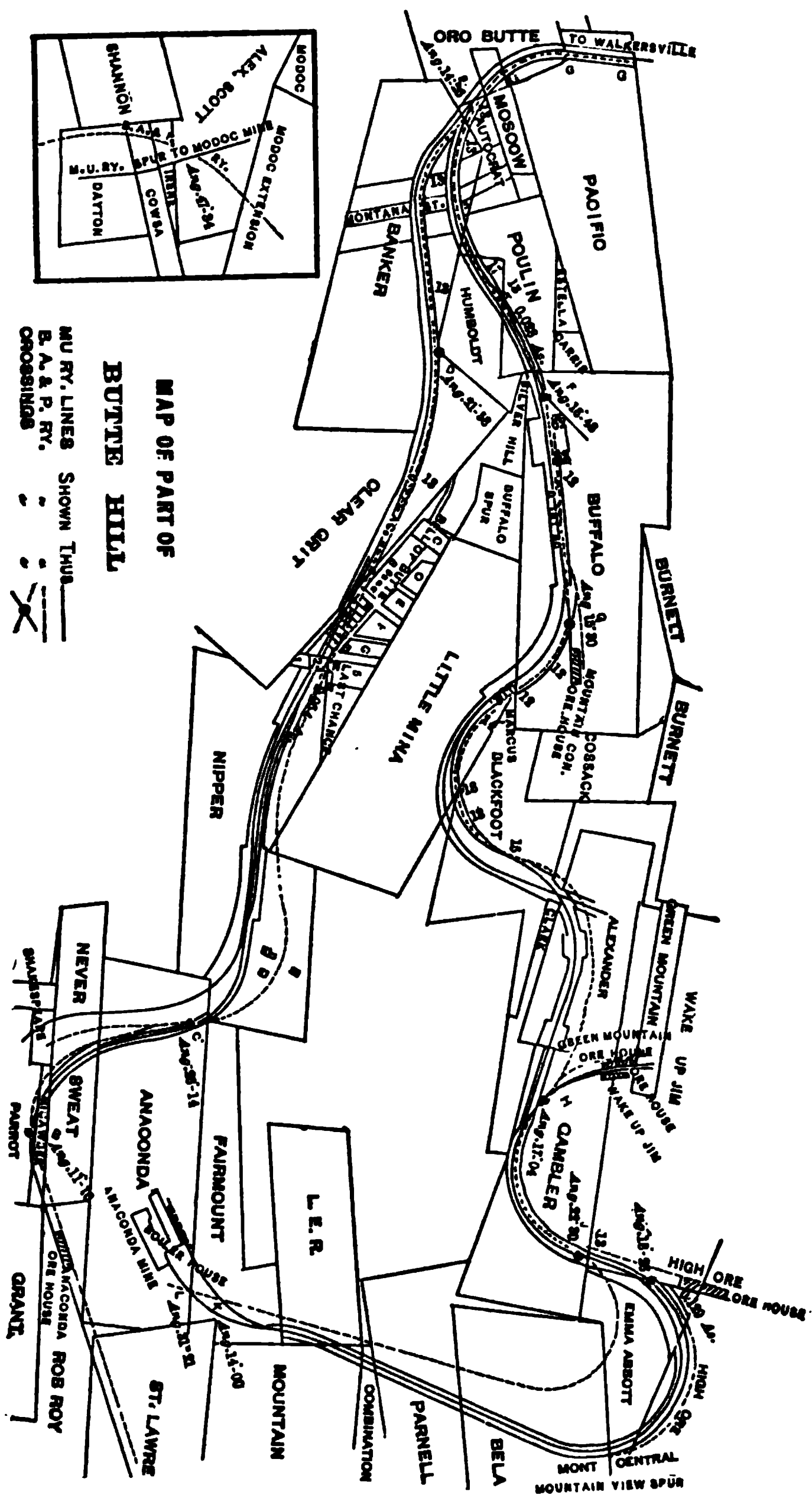
M. Kirkpatrick, W. W. Dixon, and William Scallon, for the respondent.

⁵²² HUNT, J. By this appeal we are called upon to decide questions of importance, not alone to the community at large, but especially so to railroad corporations, possessed of such powers as may be granted to them under the constitution and laws of the state.

The topography of Montana, as characterized by its name, renders it of unusual significance that the laws of eminent domain be correctly expounded at this comparatively early period of the development of the state.

The strict limits of all delegated authority to take the property of another must be cautiously and accurately guarded, lest private rights or those conferred be unnecessarily invaded. On the other hand, if the power to take has been delegated, ⁵²³ that power must be precisely defined and upheld by the courts, as one vitally affecting the material interests of the state.

The ways for railroads to reach remote mining camps, some-



times lying within small areas, upon precipitous mountainsides, at unusual altitudes, and in steep and rocky sections, are often very few, and only feasible at all by skillful engineering and vast outlays of money. Where, therefore, two or more railroads, in their mountainous routes, may seek the same objective mineral districts in view of their probably necessary juxtaposition, their rights must be carefully established with relation to the law as applied to the physical, as well as other and more general, conditions controlling them in their obligations toward one another and to the public as well.

Two main propositions are presented for review: 1. Are plaintiff's road and branches public uses? 2. Can the plaintiff company construct its road within the defendants' right of way, and is plaintiff's use of the ground a more necessary use than that of the defendant companies, and is the ground sought to be taken necessary to plaintiff's use, and not necessary to defendants' use?

It is well established that if, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material: *Talbot v. Hudson*, 16 Gray, 417. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small: *Phillips v. Watson*, 63 Iowa, 28; *Lewis on Eminent Domain*, 241; *Shaver v. Starrett*, 4 Ohio St. 496; *Kettle River Ry. Co. v. Eastern Ry. Co.*, 41 Minn. 461; *Randolph on Eminent Domain*, sec. 56.

The circumstance that the plaintiff road was built by a private corporation, and that its branches run within convenient contiguity of private mines or orehouses, does not materially affect the road and give a private character to its use, or to the use of its spurs. All termini of tracks and switches are more or less beneficial to private parties, but the public character of ⁵²⁴ the use of the tracks is never affected by this. "It may be, in such cases, that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturer; yet, if there is no exclusion of an equal right of use by others, and the singleness of use is simply the result of location and convenience of access, it cannot affect the question": *Chicago Dock etc. Co. v. Garrity*, 115 Ill. 155; *Chicago etc. R. R. Co. v. Porter*, 43 Minn. 527; *St. Louis etc. Ry. Co. v. Petty*, 57 Ark. 359.

The force of these observations is peculiarly apparent in a new mining state. Frequently, railroads are extended by spurs or lateral connections of main lines, or by independent lines, into

mining camps where but a single mine is developed and capable of shipping freight. Such roads or spurs are not infrequently built by the private enterprise of those interested in the one mine to be benefited, and, when constructed, it is intended that the tracks will be used almost wholly by the mining company which constructed the spur. The supposed barrenness of the country contiguous to the road, or the undeveloped condition of the mountain in which the mine is lying, or, perhaps, the hitherto unrewarded search of the prospector, has encouraged the belief that, apart from the single mine owned by those who have built the railroad, there are no other paying properties upon which a railroad might rely for ores or supplies to transport. Such expected limited uses are but the results of the location of the mine and its inaccessibility. They do not in any way, however, exclude an equal right of use by others, perchance, desiring to ship freight or secure transportation over the road. To better illustrate our meaning, we have only to modify the instance just referred to of the railroad lateral built to a single mine. Suppose that a pioneer prospector has located and represented a claim contiguous to such railroad, but, by reason of the impracticability or expense of constructing a wagon road, he has been obliged to simply keep what he believed was a good mine, hoping that in the future railroad facilities would afford him the opportunity to haul his ore to market. Suddenly, by the enterprise of others, and without any ⁵²⁵ expectation on their part of aiding any project other than their own, a railroad is built, and he may attain the fruition of his hopes if he can use the railroad to ship his ore. Could it be contended with any merit that the railroad company, incorporated under the railroad laws of the state, can discriminate against him by saying, "We are a private enterprise, for private use, and are not generally open to the public, and for this reason refuse to haul your ore, or to bring your machinery and supplies into these hills, and you cannot compel us to act otherwise?" Or, to carry the illustration farther, suppose many mines are located close to the new line of road, and a mining district opened of incalculable interest to the state, a town springs up, with its diversified trade relations, and that thus the railroad, originally constructed and intended to subserve the single mine, with little or no thought of any greater use, may become a measure of great utility to many people; must this development stop, or be dependent upon the caprices or will or discriminatory orders of the incorporators or owners, based upon a claim that the road was constructed for private purposes, and cannot be made to answer the demands of the public?

We say, after full deliberation, that the express command of section 5 of article 15 of the constitution, that "all railroads shall be public highways, and all railroads, transportation and express companies, shall be common carriers, and subject to legislative control," etc., supplemented by the statute (Comp. Stats. 1887, div. 5, sec. 680, p. 809) authorizing the construction of sidetracks, branches, etc., has made them instruments of public service, as well as private profit, and is sufficiently comprehensive to include, not only the railroad used to illustrate our views, but, by analogy, the particular railroads of appellants and respondents in their main lines, lateral branches, and spurs, to particular mines in and about the numerous mining dumps, shafts, and orehouses described in this suit, and situate upon the hills adjacent to the city of Butte: Getz's Appeal, 3 Am. & Eng. R. R. Cas. 186.

Furthermore, it is expressly provided by section 7, article 15, of the constitution, that "all individuals, associations, and corporations shall have equal rights to have persons or property transported on and over any railroad, transportation, or express route in this state. No discrimination in charges or facilities for transportation of freight or passengers . . . shall be made . . . between persons or places within this state. . . . No railroad or transportation company . . . shall give any preference to any individual, association, or corporation in furnishing cars or motive power, or for the transportation of money or other express matter." This provision, when considered with the previous one quoted, also demonstrates that the constitution, in its letter, its spirit, and its policy as well, classes all railroads, with their feeders, such as respondent and appellants operate, as public highways, subject to use by the public of right, amenable to the laws governing common carriers forever forbidding all obnoxious favoritisms between any who desire to use such highways: St. Louis etc. Ry. Co. v. Petty, 57 Ark. 359. This stable written policy is doubtless the outgrowth of pernicious systems of discrimination and preference which railroad corporations may have indulged in throughout the land where their powers are unrestrained by constitutional or other restriction. It puts them all on a plane, and, under the facts before us, respondent and appellants, as public highways, are alike the beneficiaries of its liberality, subject, nevertheless, to its restrictions and liabilities.

Chief Justice Hawley, for the supreme court of Nevada, vigorously discusses a "public use," as meant by the constitution of that state, and concludes that the necessities of the business of mining, milling, smelting, etc., are of direct interest to the people of Nevada, and that a statute of that state is constitutional

which authorizes land to be condemned for the necessities of such business: *Dayton etc. Min. Co. v. Seawell*, 11 Nev. 394. This decision was afterward expressly affirmed in *Overman etc. Co. v. Corcoran*, 15 Nev. 147, and again recently approved by its learned author, in the United States circuit court for Nevada, where the court upholds a ⁵²⁷ statute authorizing the appropriation of land for a mining tunnel-as a proper exercise of eminent domain, on the ground of "great benefit and advantage to the mining industry": *Douglass v. Byrnes*, 59 Fed. Rep. 31.

The supreme court of Georgia held in *Hand Gold Min. Co. v. Parker*, 59 Ga. 419, that a section of an act of the legislature incorporating a gold placer mining company, and giving it power, under the constitution, to take the private property of the complainants for the use of their ditch, for the purpose of extending the same to their own land, on payment of just compensation therefor, was constitutional. "Gold and silver," say the court, "is the constitutional currency of the country, and to facilitate the production of gold from the mines in which it is imbedded, for the use of the public, is for the public good, though done through the medium of a corporation or individual enterprise."

In a comparatively recent decision (*Oury v. Goodwin* (Ariz.), 26 Pac. Rep. 376), the court sustained an act of the territorial legislature permitting the condemnation of appellant's real estate for the purpose of an irrigating canal, basing their opinion upon the principle that a state may, in view of its natural advantages and resources and necessities, legislate in such a way, exercising the power of eminent domain, that these advantages and resources may receive the fullest development for the general welfare, the laws being general in their operation.

The Nevada and Georgia cases have been disapproved of by Lewis on Eminent Domain, section 184, but the disapprobation is based upon the ground that a law which granted a right of condemnation for a purpose singly and essentially private in its nature could not possibly subserve any public use, or be of any public benefit, and hence is an invalid attempt to take private property for private use, and not upon the soundness of the argument that the magnitude of the interest of a state may be considered, for which alone we cite them. The reasoning of these cases, however imperfect the application to particular facts may have been, is well sustained: *Randolph on Eminent* ⁵²⁸ *Domain*, 50; *Wood's Railway Law*, 822; *Mills on Eminent Domain*, sec. 20; *Cooley's Constitutional Limitations*, 533; *Hibernia etc. R. R.*

Co. v. De Camp, 47 N. J. L. 518; 54 Am. Rep. 197; 1 Borer on Railroads, sec. 409; Comp. Stats. 1887, sec. 1495, et seq.

The public interests are benefited by railroads, and the right of eminent domain may be exercised through the medium of corporate bodies. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare: *Beekman v. Saratoga etc. Co.*, 3 Paige, 45; 22 Am. Dec. 679; *Lewis on Eminent Domain*, sec. 170; *Dietrich v. Murdock*, 42 Mo. 279.

Where the general public advantage is greatly promoted by the improvement of water power in the streams and waters of a country, private property taken for that purpose is taken for a public use, within the meaning of that term: *Hazen v. Essex Co.*, 12 Cush 475. Indeed, in New England, we find the courts very emphatic upon the question. Chief Justice Perley, after speaking of the interests that New Hampshire had in the improvement of her natural water powers, wrote as follows: "No state of the Union is more interested than ours in the improvement of natural advantages for the application of water power to manufacturing purposes. Nature has denied to us the fertile soil and genial climate of other lands, but, by way of compensation, has endowed us with unrivaled opportunities of turning our streams of water to practical account. The present prosperity of the state is largely due to what has already been done toward developing these natural advantages; and there is no assignable limit to our resources in this respect, if extended and connected enterprises for the improvement of the water power in the state should be successfully prosecuted hereafter. In no part of the world have the public a deeper interest in the success of all undertakings which promise to assist in the development of these great natural advantages. Whether, therefore, we look to the interpretation which has been given in other jurisdictions to the term 'public use,' in ⁵²⁰ reference to the right of taking private property for such a use, to the legislative practice under the provincial and state governments before and at the time when the constitution was adopted, to the language of the constitution itself, to the early and continued legislative practice under the constitution, to the decisions of the courts in this state, or to the character of our business and the natural productions and resources of the state, we are drawn to the conclusion that the legislature have power to authorize a private right, that stands in the way of an

enterprise set on foot for the improvement of the water power in a large stream like this river, to be taken without the owner's consent, if suitable provision is made for his compensation, and that the act of 1862 is constitutional and valid": *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Olmstead v. Camp*, 33 Conn. 532. See, also, *Scudder v. Trenton etc. Co.*, 1 N. J. Eq. 695; 23 Am. Dec. 756; *Mills on Eminent Domain*, sec. 183.

So vital to the development of the agricultural interests of the state is water for irrigation that, as a part of the bill of rights of the constitution, it is provided: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs, necessary for collecting and storing the same, shall be held to be a public use. Private roads may be opened in a manner to be prescribed by law, but, in every case, the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited: Const., art. 3, sec. 15.

The improvement of Boston harbor by reclamation of a large body of land for commercial purposes was held to be of great public advantage: *Moore v. Sanford*, 151 Mass. 286.

"The ever varying condition of society is constantly presenting ⁵³⁰ new objects of public importance and utility, and what shall be considered a public use or benefit may depend somewhat on the situation and wants of the community for the time being." But the underlying principle remains, that there must be a public use or benefit. "But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to general rule": *Scudder v. Trenton etc. Co.*, 1 N. J. Eq. 695; 23 Am. Dec. 756; *Talbot v. Hudson*, 16 Gray, 417; *Buffalo etc. R. R. Co. v. Brainard*, 9 N. Y. 109.

In thus ingrafting upon the law of this jurisdiction the doctrine that the magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad to construct lateral branches, tracks, and spurs to mines and mining works, as public uses, by virtue of the law of eminent domain, we are always duly mindful, not only of the constitutional guaranty of the individual right of possessing and protecting property, but are equally impressed with the declaration that "the

good of the whole" is the very foundation of the constitution. Indeed, it may be said that upon this latter axiom of all government by the people rests the principle itself. The force of the principle may vary in different communities. What cogently applies to Montana, with its mountains and quartz, would be an absurd process of reasoning to urge in Louisiana, where scarce an undulation marks the surface, or a mineral lies beneath it. Therefore, to correctly define what that force is, in the case before us, it is eminently reasonable and appropriate that the conditions of the whole people to be affected should be considered. In this state, where, almost wholly through the facilities and advantages of railroads, the quartz mines have been developed to such an extent that the mineral output is only exceeded by that of one or two older mining states, the publicity of the use of railroads into the camps is too obvious to require more extended comment. In the language of the eminent counsel who so lucidly presented respondent's side of the case: "Again, in Montana, mining is the dominant industry. Throughout a large portion of the state, and in the county of ⁵³¹ Silver Bow especially, it is the all-important pursuit, upon which all other industries are dependent. In the mining, smelting, and reduction of ores, the great mass of the population finds employment and support. The prosperity of the state is very largely due to the development of the mines."

Having determined that the respondent's railroad and laterals, branches, and spurs are all public highways, within the legal bounds of public uses, it follows that the law of eminent domain was available to them, provided: "1. The use to which the respondents have applied the ground taken is a use authorized by law; 2. That the taking was necessary to such use; 3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use": Code Civ. Proc. sec. 601.

That a necessity exists which requires property to be taken is obvious. This follows as a conclusion of the determination that the purpose of the plaintiff is a public use: *Moore v. Sanford*, 151 Mass. 286. But, insist the appellants, although we grant a right of way is necessary, if it is held that the Butte, Anaconda, & Pacific Railway is a public use, nevertheless, at the very threshold of this branch of the case, we deny the necessity of the particular land for the railroad uses for which respondent seeks to appropriate it.

The district court found that the ground included within the

defendants' right of way was necessary to the plaintiff for the proper construction and maintenance of its road, that such ground was not necessary for the use of defendants' railway, and was not in actual use by them at the time of the order, and that the use for which the plaintiff sought to condemn the same was a more necessary public use than any use the defendants have or could put the same to.

Without more prolixity than we think is essential to make clear our opinion, we will state the concluded facts apparent to us. The country through which the contending railroads run is one of the mountains of the main Rocky Mountain range, and known as the "Butte Hill," above the city of Butte. The railroads about the hill are really great broad gauge spurs ⁵³² of their respective main lines. From these great spurs many short ones project, running to orehouse or mining shafts. The principal object of both railroads, in their branches about the "Hill," is to haul ores from, and supplies to, the several quartz mines indicated upon the map, to wit, the St. Lawrence, Anaconda, Wake Up Jim, Buffalo, Moscow, and others. The Butte, Anaconda, & Pacific (respondent) tracks for the most part lie north of the Montana Union tracks. The Montana Union right of way was twenty-five feet on either side of the center of its tracks. It had, however, graded along the hill only to an extent a little more than necessary for the actual space occupied by its roadbed. In many places, the hill is so very steep, or so rocky, or both, that the rails must have laid very close to the bluffs just north of the tracks. There was no actual use of such bluffs or other ground adjacent to the Montana Union tracks, nor could it actually occupy the same, without heavy excavation work on the upper side. Commencing at a point on the hill within the limits of the Nipper quartz mining claim, the Butte, Anaconda, & Pacific, with its road, was graded and excavated on the upper side of appellants' roadbed, and is within the right of way of the Montana Union for about a mile and a half. At places the south rails of the Butte, Anaconda, & Pacific road are within ten feet of the northern rails of the Montana Union, but, as a rule, there is some seventeen to twenty-two feet between the centers—that is, from the center of the Montana Union tracks to the center of the Butte, Anaconda, & Pacific tracks. These distances, excluding the crossings, are sufficient to prevent any interference between the successful operation of the two roads. The strips of ground which the plaintiff would condemn and appropriate vary in width, the variance being evidently based upon what the plaintiff deems necessary for the operation of its

road, considering the points to be reached, and the distance which would and must separate the two roads when constructed. Prior to the institution of this action—that is, in 1893—various lines and means of getting to the several orehouses marked upon the map were projected. ⁵³³ All these orehouses are at the same level as to the grade of the two roads, several of them, however, being below the level of the Montana Union main track. By the abrupt rise in the hill and its rocky character, and because of the necessity of the Butte, Anaconda, & Pacific crossing divers spurs of the Montana Union, it is necessary that the right of way of the Butte, Anaconda, & Pacific be laid down to the same level as the Montana Union. This necessity could only be obviated by requiring the Butte, Anaconda, & Pacific to either cross the spurs of the Montana Union at grade, or construct its road high enough to go overhead, or low enough to pass beneath, the spurs. To go under them would require the plaintiff to undertake an engineering task so far beyond what is deemed practicable or reasonable that it need not be considered at all. To build its line overhead would compel the Butte, Anaconda, & Pacific to construct its road at more than twenty feet above the crossings, so that, when it passed the orehouses which the two roads go to, the plaintiff's road would be useless, unless, after running beyond the orehouses, switchbacks were constructed down the hill, by which they could reach the objective points. To follow this plan would require the plaintiff to run into the mountain at points beyond the orehouses, at enormous expense of construction, and right of way, probably; and the road, when thus constructed, would be very impracticable to successfully run or operate. If the Butte, Anaconda, & Pacific constructed its line above the Montana Union, it follows that the cuts through which it would have to run would be very much heavier than its present line, and, at their objective points, it would still be necessary for the two roads to be within a few feet of one another. Another objection to running higher up the hill is, that such a route would materially interfere with the operation of the mines on the mountain. In such case, shafthouses would be cut through, dumping grounds intersected, and quartz mining operations seriously interfered with. The route chosen was deemed by far the most feasible and practicable one. Other routes could have been selected, according to the engineers' evidence, but any practicable one ⁵³⁴ which might have been chosen would have crossed the main line of the defendants, as well as many of their spurs. The plaintiff, by going upon the right of way of the defendants, widened the cuts which defendants had already made in many

places, but, when we consider that the hill had remained in its natural state until further excavated by the plaintiff, it is plain that no material damage was done to the defendants by the plaintiff by the mere act of excavating as it did. On the contrary, such excavations are a benefit from a mere standpoint of construction. Upon one part of the right of way, lying within the Belle of Butte addition to the city of Butte, the natural physical obstacles to selecting another route were not so great as higher up the hill; but, in order to conform with the grade necessarily chosen to reach the point higher up the hill, the most practicable route was that selected through the Belle of Butte addition, particularly in view of the fact that had they kept off the right of way of the defendants, the plaintiff would have been compelled to pay for a number of dwelling-houses and the lots which they were on, and other parts of their line would have been affected.

An experienced engineer, Mr. N. C. Ray, testified in behalf of the defendants that he had, at a time long prior to the institution of this suit, and at a time when there were not so many houses about the foot of the hill, and not so many mines developed and orehouses built on the mountain, made a survey for another railroad, with a view of finding a practicable route. His proposed line ran on the south or lower side of the present Montana Union track. It was proposed by this route to make most of the crossings of the Montana Union spurs grade crossings. It appeared, also, that the Ray route, if followed, would necessitate for a long distance a retaining wall to be put up to maintain the slope of the Montana Union roadbed, and to keep it from falling over on the proposed roadbed. It would require very heavy fills or trestlework, and, withal, a scale of a map made when this projected route was first surveyed showed that there was not two hundred feet difference in the longitudinal conflict between the Ray route ⁵³⁵ and the present Butte, Anaconda, & Pacific route and the Montana Union right of way, as they appear on the maps. The total length of the present lines is about three miles, or a little less. From certain given points, there was, between such proposed route and the actual route of the Butte, Anaconda, & Pacific, a difference of three-fourths of a mile, the greater length being the Ray route. The Ray route necessitated five grade crossings of the main track of the Montana Union, all of which, it satisfactorily appears, were more undesirable than an equal number of crossings would be over spurs. Moreover, the Ray line, if run at the time this litigation first arose, would have encountered buildings, shaft-

houses, and dwelling-houses which were not in existence when the line was first proposed. It would have been vastly more expensive, by reason of the enhanced value of the right of way, and we think it only fair to say that, as the conditions existed at the time that the testimony was taken in this cause, his route was impracticable. Moreover, the Ray route was not projected with a view to serving all of the various orehouses touching plaintiff's and defendants' roads, the only branch appearing on the Ray map being to the High orehouse, and a branch to the Anaconda and the Humboldt.

One of the objections interposed by the defendants to the occupancy of their right of way was the difficulty of throwing out switches or sidetracks to the north of the Montana Union, but the engineers swear that if they have distances to centers between tracks of twenty-two feet, there is room between the two tracks for another track, and if the Butte, Anaconda, & Pacific elevation is so high that the Montana Union cannot get over by crossing at right angles, a spur can be run at any distance in order to attain the proper elevation.

Another objection vigorously urged was the difficulty of handling ties where the roads were very close together. But it appears that some of the greatest railroads in the country, notably the Pennsylvania system, have three tracks abreast, with centers of the two outside tracks twenty-two and one-half feet apart. Ties are successfully handled on such roads, ⁵³⁸ and we see no reason why they should not be upon the roads of the contending parties at bar. Besides, the hill, as it stood, was certainly a much greater obstacle to necessary conveniences in this respect than it is as excavated to a level with appellants' roadbed.

It was also urged that the right of way taken by the defendants was necessary, in case of future double tracks or sidings, but as these needs are mere future possibilities, not based upon reasonably apparent traffic needs, we do not think the showing is strong enough to merit very serious consideration.

A great deal of testimony was also taken upon the inconvenience to the defendants in the operation of their trains at various crossings, where the construction of plaintiff's road prevented the defendants from handling as many cars at one time as they could handle if the plaintiff's road were not in their way. Eliminating the consideration of the Gagnon, Buffalo, and Haggin spur crossings, which are referred to hereafter, we are constrained to hold that, as the law expressly gives the right of crossing and intersecting (Const., art. 15, sec. 5), the interference is only such as is essential to any method of operation of two railroads where

they cross and intersect one another on the side of a mountain, where their respective ways are necessarily very limited, and where both may have lawful rights of way to their respective but identical objective points.

It is well to bear in mind, in the application of the principles underlying the law of eminent domain, that the state has an inherent political right, pertaining to sovereignty, and founded on what has been expressed to be a "common necessity and interest," to appropriate the property of individuals to great necessities of the whole community, where suitable provision is made for compensation: *Raleigh etc. R. R. Co. v. Davis*, 2 Dev. & B. 451; *Lewis on Eminent Domain*, sec. 3. This right, says the constitution of Montana, article 15, section 9, "shall never be abridged, nor so construed as to prevent the legislative assembly from taking the property and franchises of incorporated ⁵⁸⁷ companies and subjecting them to public uses, the same as property of individuals." The public welfare is, therefore, the particular base upon which must be laid the correct application of the doctrine itself. The right of eminent domain may be of the greatest value to the respondent, or to any other corporation which may exercise its privileges, but that is an incident which must be subordinated by the courts to the question of public use, and to the consideration of the benefits to accrue to the public by the construction of the contemplated project. There is, however, a rule of construction, sustained by the great weight of well-considered authority, to the effect that this power to take the property of private citizens or other corporations for public use must be exercised, and can be exercised, only so far as the authority extends, either in terms expressed by the law itself, or by implication clear and satisfactory: *In re Buffalo*, 68 N. Y. 167; *Sutherland on Statutory Construction*, sec. 388; *Mills on Eminent Domain*, sec. 46.

In our opinion, the testimony in this case shows that the particular location of respondent's railroad is by far the most practicable which could have been found, and, considering the fact that any other route would have impinged upon the appellant's right of way very nearly as much as the present route does, and that such other route would have affected many mining operations, would have been enormously expensive, and much less convenient or somewhat less safe, and that it is manifestly to the best interests of the public generally that railroads be constructed throughout the mountains, over such routes as will enable the public to receive the best and most expeditious service which can be attained, we think that the taking of the portions

of the right of way of appellants' road was necessary to the use, which was public, of the respondent's railroad.

Now, however, having advanced to this point of the case, we are met with this argument by the appellants' counsel, namely, that this right of way was already appropriated, and that there was no delegation of power to any corporation under the eminent ⁵³⁸ domain laws of the state to take property already appropriated to a public use, unless, as provided by the last clause of the third subdivision of section 601 of the Code of Civil Procedure, 1887, "the public use to which it is to be applied is a more necessary public use." We have already concluded that this land was necessary to respondent's use, and the question therefore is, Is respondent precluded from condemning these necessary lands because they have already been condemned for public use by the appellants? If the question were limited merely to this single inquiry (unless some other statute authorized a taking), doubtless, under rules of construction, we should hold that the respondent could not invade the right of way of the appellants. But our legislature has imposed upon the court the additional responsibility of judicially determining whether the use to which the appellants did or would put the particular lands is a more necessary one to the public than that to which they have already been appropriated by the Montana Union railway. We therefore find the whole proposition resolves itself under the facts to this: A part of the right of way of the Montana Union Railway Company has never been used by it for railroad purposes for the several years during which the road has been constructed and in operation, and is not reasonably requisite for future uses. The Butte, Anaconda, & Pacific Railway Company, in the location of its only really practicable route, desires to take parts of such unused portions of the Montana Union right of way, such portions being necessary for their actual use, and unnecessary for the actual use of the appellants.

We have used the word "necessary" advisedly throughout this opinion, although, when we say that the route chosen by the Butte, Anaconda, & Pacific requires the taking of the lands in question as necessary for public use, we do not mean that there is an absolute necessity of the particular location they seek. But, under the statute, such an absolute necessity is not a prerequisite to the exercise of the law of eminent domain.

We are aware of the decision of the supreme court of Pennsylvania (Sharon Ry. Co.'s Appeal, 122 Pa. St. ⁵³⁹ 545, 9 Am. St. Rep. 133), that land once appropriated by a railroad company to public use under the right of eminent domain cannot

afterward be appropriated by another company to the same use, except in case of "absolute necessity." There one road sought to take part of the yard of another. The facts warranted a finding by the master that the lands sought to be taken were convenient and necessary to enable the plaintiff company to economically and expeditiously carry on its present and prospective business, and it was upon such a finding that the court held as it did. If the learned judges meant by an absolute necessity to exclude entirely the element of reasonableness in the measure of their words, we are constrained to take a different view of the law in interpreting our statute, and, in so doing, we find ourselves in thorough accord with three of the justices of the same court in their dissenting opinion, reported in Appeal of Pittsburgh etc. Ry. Co., 122 Pa. St. 511, 9 Am. St. Rep. 128, and decided just two years before the absolute necessity rule was laid down in the case hereinbefore cited. The appeal in Appeal of Pittsburgh etc. Ry. Co., 122 Pa. St. 511, 9 Am. St. Rep. 128, in its facts was much closer to the case at bar than Sharon Ry. Co's Appeal, 122 Pa. St. 545, 9 Am. St. Rep. 133. The Allegheny Valley Railroad Company claimed to own certain property in the city of Pittsburgh, extending from Forty-third street to Forty-seventh street, and from an unnamed street on the south to low-water mark on the Allegheny river on the north, all of which property it claimed to have in constant use in connection with the operation of its railroad. The Pittsburgh Junction Company entered upon a part of this property, and commenced to lay ties and rails thereon, and to tear up the track that had been used by plaintiff for many years, and it was alleged that, if the defendant was permitted to go on, it would seriously interfere with and cripple the operation of the plaintiff's road, and would ruin its roadbed, and render it unable to perform the duties imposed upon it toward the public. The defendant contended that it was authorized to locate its road between certain points, and it was obliged to run along the bank of the Allegheny river, and that it had a right to run where it did, and denied that all of the ⁵⁴⁰ property used by the plaintiff in connection with the maintenance and operation of its railroad was used, or that it was all indispensable to plaintiff's use. The supreme court held that the plaintiff road could consider the needs of the future, and that the defendant could not interfere with the present or future use contemplated by the plaintiff, and that no actual encroachments would be allowed. Perhaps the decision turned, in the opinion of the majority of the court, upon the ground that the defendant could have, without any trouble besides ex-

pense, constructed its road at another point, as the court say: "We are not embarrassed with the questions that would arise if the defendant company could not build its road without laying its track through the plaintiff's yard." The minority opinion by Judge Tounkey is very brief, and we quote so much of it as is applicable to the facts at bar: "In this case, the testimony clearly shows, and it was so found by the master, that there is ample room next the river where the appellant could lay its tracks without material injury to the property of the appellee. The inconvenience to and cost of changes by the appellee could be compensated in damages. The prudent appropriation of a parcel of land extending from low-water mark on the river to the hillside by the appellant, the whole of which land is not necessary for the uses of its road, ought not to bar the construction of another railway in the valley by a company subsequently chartered."

About the same time that the Pennsylvania rule of absolute necessity was announced, the supreme court of Alabama, in *Mobile etc. R. R. Co. v. Alabama etc. Ry. Co.*, 87 Ala. 501, discussed, with a learning which generally characterizes the decisions of that respected court, the right of a railroad company to take by condemnation proceedings part of the property of another railroad company already devoted to a public use, and say: "As a general rule, a corporation to whom the right of eminent domain is delegated, having the right to locate the line of its road between the terminal points, has also the correlative right, to some extent, to select the lands to be taken. But the discretion must be reasonably exercised, so as to cause ⁵⁴¹ as little damage as is practicable; and, if abuse in the selection is made apparent, the court before whom the proceeding is pending should interfere to control the discretion, and prevent the abuse by refusing an order of condemnation: *New York Cent. etc. R. R. Co. v. Metropolitan Gas-Light Co.*, 63 N. Y. 326. According to the rule stated above, the liability of any portion of the right of way of the *Mobile & Girard Railroad Company*, though not in actual use, to condemnation for the use of the *Alabama Midland Railway Company*, is subject to the qualification of a necessity therefor. It would be difficult to lay down any specific rule, as to the measure of the necessity, of sufficient scope to include all cases. It may be observed, generally, that 'necessary,' in this connection, does not mean an absolute or indispensable necessity, but reasonable, requisite, and proper for the accomplishment of the end in view, under the particular circumstances of the case. On the evidence, there is little room

for doubt that the route selected by the Alabama Midland Railway Company to get into the city of Troy and out to the west is the most practicable, if not in its proper sense the only practicable, route": *Anniston etc. R. R. Co. v. Jacksonville etc. R. R. Co.*, 82 Ala. 297.

Again, the absolute necessity rule not only will not consist with the express delegated authority to take the property of a corporation by virtue of eminent domain, but, if we carry it to its logical results, it is this, that where one corporation to which has been granted the right of taking property by eminent domain has exercised that right, it cannot be interfered with, except for crossings and intersections. This is fallacious. In mining districts, it leads to exclusion. When a similar question arose in Illinois, Judge Breese, for the court, thus tersely disposed of it: "The argument, when reduced to its proper measure, is, that while the land of all other persons and corporations lying on the route of a railroad is subject to the power of eminent domain, that belonging to a railroad company is not thus subject. Such land must remain intact. We cannot assent to this proposition": *Peoria etc. R. R. Co. v. Peoria etc. R. R. Co.*, 66 Ill. 174.

⁵⁴² We find the federal court for the district of Colorado taking substantially the same view of the necessity rule as the Alabama court did: *Colorado etc. Ry. Co. v. Union Pac. Ry. Co.*, 41 Fed. Rep. 293. The Colorado Eastern Railway Company sought to condemn certain property within the limits of the city of Denver, claiming that the ground was necessary for its use for various railroad purposes. The defendant contended that the land was not of such necessity to the plaintiff as to justify the taking from defendant, and that the land had already been appropriated by defendant to its own use as a public railroad, and was eminently necessary to its prospective business. Philips, J., decided that the ground was necessary to the petitioner, because it was the only piece of ground available to the petitioner without entirely changing the survey line and undertaking to accomplish its destination by a circuitous route, and that it would not be a wise judicial discretion to compel the petitioner to adopt a road highly inconvenient, longer, and less available. It was plain in that case that another route could have been selected, and, aside from the matter of economy, with very much more ease than could the respondent, in the case at bar, choose another route for the Butte, Anaconda, & Pacific road; but the court evidently refused to follow the absolute necessity rule, and based its decision upon the more just doctrine

of the necessity of the petitioner, founded upon the practicability, economy, facilities, and other considerations which should govern the determination of what the necessities may be, always considering the rights of the senior company, yet never forgetting the benefits to the public.

The laws of the state authorized the respondent to locate its railroad. It had a right to select the most feasible route, provided, in doing so, it did no unnecessary injury to the public or to the appellants. The law does not give to the respondent any predominant right over the appellants, though certainly the line of respondent should be so run as not to materially interfere with the efficiency of the Montana Union: *New York etc. R. R. Co. v. Boston etc. R. R. Co.*, 36 Conn. 196. ⁵⁴³ We find no violence done to these principles. The inconveniences inevitably incident to the crossing of one road by another are not violations of the principles. On the other hand, lands belonging to the Montana Union by way of easement and not actually in use by such company, or not actually necessary for the enjoyment of their franchise, should be upon the same footing as the land of the individual citizen: *Peoria etc. R. R. Co. v. Peoria etc. R. R. Co.*, 66 Ill. 174.

It was never contemplated by the constitution that competition between railroads should not be sanctioned. On the contrary, our construction of the law is, that it is the policy of this state, voiced in its constitution and statutes, to build up competing roads, rather than to deter them. If this were not so, why did the legislature expressly include the right to take lands already appropriated by one corporation, and devote them to public use, where the latter use was a more beneficial one than the former? The mere fact that the easement is held by a corporation, and that another corporation takes it to subserve public use, cannot affect the principles so long as the second taking is for the greater public good: *Northern R. R. Co. v. Concord etc. R. R. Co.*, 27 N. H. 183. Nor can the claim of a superior equity of respondent be urged as a sound argument, based upon the fact that the appellants already have appropriated the property for public use: *Chicago etc. R. R. Co. v. Lake*, 71 Ill. 333.

The Montana Union accepted its easement with the reserved right in the state to retake it whenever the public necessity might require, provided, always, just compensation should be made when it might be retaken.

One public corporation cannot take the lands or franchises of another public corporation in actual use by it, unless expressly authorized to do so by the legislature. But the lands of such a

corporation not in actual use may be taken by another corporation, authorized to take lands for its use in invitum, whenever the lands of an individual may be taken, subject to the qualification that there is a necessity therefor: 2 Wood's Railway Law, 856.

⁵⁴⁴ We think this to be the true rule, and that opposing corporations may be limited to the enjoyment of that property in actual use by them, and that which is reasonably necessary for the safe, proper, and convenient management of their business, and the accomplishment of the purposes of their creation: Mobile etc. R. R. Co. v. Alabama etc. Ry. Co., 87 Ala. 501.

Upon this proposition, we again refer to the opinion of Judge Philips (Colorado etc. Ry. Co. v. Union Pac. Ry. Co., 41 Fed. Rep. 293), where it was held "that mere priority of acquisition, or even of occupation, gives no exclusive right, except in so far as the condemnation trenches on the greater necessities of the other franchise." As has been stated heretofore in this opinion, the right of way prayed for by the respondent in this case was not occupied, and the mere priority of the acquisition of the Montana Union must give way, under our laws, to the superior uses and greater needs of the Butte, Anaconda, & Pacific Company, as more necessary to the public.

The learned counsel for the appellants have cited us to many cases besides the Pennsylvania ones already referred to. We will notice one or two principal ones. Barre R. R. Co. v. Montpelier etc. R. R. Co., 61 Vt. 1, 15 Am. St. Rep. 877, simply decided that one railroad company, to avoid a sharp curve in its road, could not take the land of another company, as condemnation was sought upon the ground of convenience, rather than necessity. We find nothing in the case to the effect that, if the necessity existed, still the ground could not be taken.

Boston etc. R. R. Co. v. Lowell etc. R. R. Co., 124 Mass. 368, was decided upon the ground that there must be an express legislative grant to authorize a longitudinal road to be built upon the right of way of another road, and that the statutes did not contemplate such a taking, but the court recognized that cases may arise where the authority to take land already devoted to another railroad may be implied, either by the language of the act or from the application of the act to the subject matter, as where the railroad could not be laid, in whole or in part, by reasonable intendment, on any other line.

We are cited by the appellants to the case of Illinois Cent. ⁵⁴⁵ R. R. Co. v. Chicago etc. R. R. Co., 122 Ill. 473. In that case, one railroad sought to run within the right of way of an-

other for a distance of eleven miles. A majority of the court held that one company could not take any part of the right of way of another, except at a point of crossing, intersection, or union. The Illinois statute granting rights of way to railroad companies was substantially like the first portion of the fourth subdivision of section 600 of the laws of eminent domain (Comp. Stats. 1887, p. 216), which is as follows: "All rights of way for any and all purposes mentioned in section 598, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by, any other right of way, or improvements or structures thereon."

It was argued to the court that the provisions of such a statute were broad enough to permit the taking of the right of way of one company by another, but it was decided that the taking contemplated was limited to crossings, intersections, or unions, and not taking for another road longitudinally. Two judges dissented from that opinion, and, although we do not find it necessary to approve or disapprove of the law of that case, we note that our statute seems to go farther than the Illinois law, for with us it is expressly provided, in the latter part of the section just quoted: "They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such use, crossings, intersections, and connections shall be made in a manner most compatible with the greatest public benefit and least private injury." If the property to be subject to limited use in common with the owner means, generally, rights of way, longitudinal as well as others, and the statute does not restrict the application of the pronoun "they" to rights of way immediately connected with crossings and intersections, but enlarges the use of all rights of way when necessary, it would seem by no means unreasonable that conditions like those presented in the case under consideration were in the minds of the legislature at the time that this section ⁵⁴⁸ became a law, and that of necessity all rights of way shall be subject to a limited use, in common with the owner thereof.

Perhaps the statute may have meant, by using the word "owner," the owner of the fee, to whom all rights in the property might revert if there were no longer any public use thereof, or it may mean the easement for use of the corporation which had acquired an easement over the property by virtue of the law of eminent domain. We simply refer to this matter in view of the citation made.

From the decision in the case of Contra Costa etc. R. R. Co. v.

Moss, 23 Cal. 323, it appears the court did not consider the effect of any statute similar to ours granting the right to take land once appropriated, if indeed there was any such statute in existence in California when that decision was rendered in 1863. It was held that there was no right to condemn or appropriate land along or upon a previously located line of another railroad company, except for crossing purposes. The court announced that, by its priority of location and appropriation, a railroad company acquired a "vested right to its line of road and the land necessary for its construction, as prescribed by the railroad laws, of which it cannot be divested by another company, who seek to appropriate the land for the same use." We must decline to assent to this proposition as it is stated, without careful qualification and modification.

We cannot agree that the statute which authorizes lands to be appropriated for a more necessary public use means a different public use in all cases. If the legislature had intended that construction to be put upon the statute, instead of carefully restricting the right to a more necessary public use, they could easily have said a different public use. Besides, the view which we have discussed is consonant with those clauses of the constitution inhibiting discriminations, as already enumerated. If the appellants' construction were adopted, the practical result would be the exclusion, oftentimes, of more than one railroad on mountain-sides or in mountain gorges or precipitous gulches, or routes not embraced within the definitions of canyons, defiles, or passes, especially provided ⁵⁴⁷ for by law: Comp. Stats. 1887, div. 5, sec. 688, tit. "Railroad Corporations." Consider a practical application. A railroad company would take the maximum right of way. Now, if the right of eminent domain is not conferred upon the junior company to take lands for a public use, unless for a different use, the first railroad would be enabled to prevent any and all competition, because, oftentimes, any route off the right of way of the first would be, if not an absolutely impassible one, so impracticable and so enormously expensive, that it must, as a reasonably necessary consequence, deter another corporation from building at all.

To conclude, we adopt that construction which is more jealously careful of the best interests of the state, and say that, where a railroad company traversing the side of a mountain in a mining section has within its right of way tracts of ground not necessary to the proper, successful, and safe operation of its system of tracks and spurs, and not used by it in connection with any

such operations, and, in all reasonable probability not necessary for any such future use, if another road seeks the same objective points, and, in doing so, is obliged to take part of such unused right of way to avoid a considerably more circuitous route, at a different grade, of very much greater cost, and of serious damage to many mining properties in their subterranean and surface operations, and, withal, would be obliged, by the topography of the mountains, to parallel the adversary road a part of the way, under such conditions the use of the unused parts of the right of way of the one company by the other is a more necessary public use than that to which such unused portions are already appropriated. Wherefore, the law will permit the taking, regarding the interference as a "tolerable one," to be compensated by damages to be paid: *In re Buffalo*, 68 N. Y. 167.

In concluding this opinion, the court expresses its acknowledgment for the argument and research of counsel on either side. By their aid, we have been greatly assisted to determine between the parties whether plaintiff could invoke the law of eminent domain in this case—that power in the exercise of ⁵⁴⁸ which, a modern writer (Randolph) says, is invariably provoked a direct issue between man and the state.

SPURS AND CROSSINGS.

Gagnon Spur Crossing. The order of the district court in relation to the Gagnon spur is more fully set forth in the statement of facts appended to this opinion. Its use to the defendants was for the delivery of supplies and fuel to the Gagnon mine. It was on the north side of the Montana Union track, while the mine is on the south side of the track, and at such a distance from the railroad that supplies are hauled by wagon from the spur to the mine. Where the plaintiff's track crosses the Gagnon spur, it is at the same level as the defendants' track, but the spur descends from the time it leaves the Butte, Anaconda, & Pacific track, and the grade of the plaintiff's track at the point of crossing is considerably above the spur grade. In view of the fact that it would be plainly for the greater convenience of the appellant company to have the spur on the south side of their main track, the order of the district court in relation to this spur is modified, and, unless plaintiff and defendants otherwise agree, the order of the district court will be, that the Butte, Anaconda, & Pacific Railway Company, at its expense, construct a spur, or rebuild the one already constructed upon the south side of the Montana Union main track; and, further, that the said Butte, Anaconda, & Pacific Company, at its own expense, con-

struct and provide suitable and convenient approaches to said spur for teams and wagons, having due regard to the nature and facilities of transportation between the Gagnon mine and the Montana Union company.

Buffalo Spur Crossing. There is a slight difference of elevation of grades of the two roads at the Buffalo spur. The only practicable way of crossing at the point marked F on the map was to raise the grade of the track of the respondent from the switch of the main track as far as the crossing by the Butte, Anaconda, & Pacific. No change was to be made on the main line, and the grade of the spur is to be the same as formerly ⁵⁴⁹ from the crossing to the end of the spur. We think that the respondent should construct this crossing in the manner proposed, and at their expense entirely, unless it is agreed otherwise between the parties themselves.

Haggin Spur Crossing. The civil engineers take very different views of the feasibility of this crossing. A short distance from the crossing the Butte, Anaconda, & Pacific company found it necessary to construct a reverse grade leading to the Montana Union track. This made a "hump," as railroad men call it—that is, an uphill and a downhill grade—on the Butte, Anaconda, & Pacific road a very short distance from the crossing. This, of course, was necessary to enable the Butte, Anaconda, & Pacific to cross without disturbing the grade of the Montana Union track. The principal objection to it by the Montana Union witnesses was, that it was impracticable and unsafe because of passing over the hump, and, considering the general grade of the railroad, the Butte, Anaconda, & Pacific trains would break in two, and thus, by wreckage and other mishaps, the Montana Union tracks would be obstructed and their traffic materially interfered with. It is difficult for us to say, in the radical disagreements of skilled engineers, what the probable effect of this hump may be, but it occurs to us that, as its dangerous tendencies are all primarily towards accident to the Butte, Anaconda, & Pacific, and only indirectly to the Montana Union, the risk, if any, and the scientific error, if any, will fall much more heavily upon the respondent than upon the appellants, and that, therefore, it is proper for us to affirm the order of the district court.

We see no error in referring the question of damages for crossings to the commissioners, as was done by the order of the court. The statute covers the matter: Comp. Stats. 1887, sec. 607, p. 218.

The last objection of the appellants is to the order of the court giving the power and authority to the Butte, Anaconda, & Pacific company alone to employ and discharge watchmen at the crossings, for whose wages the plaintiff and defendants are jointly responsible. In view of the fact that the respondent 550 company invokes the right to make these several crossings, it would seem quite just that the expenses of a watchman to guard the Haggin Spur crossing and others, if any, where the district court ordered watchmen, should be borne by the respondent alone. We see no objection to permitting the watchmen to be chosen by the Butte, Anaconda, & Pacific company, and it will be directed by this court that the order of the district court shall be modified so as to impose the expenses of watchmen entirely upon the respondent corporation.

Let the judgment and order of the district court be remanded for modification in conformity with the views expressed in this opinion, and, when so modified, it will stand as affirmed.

Pemberton, C. J., and De Witt, J., concur.

EMINENT DOMAIN—RAILROADS PARALLELING AND CROSSING EACH OTHER—PUBLIC USE.—The right of eminent domain means that, when public necessity or common good requires it, the citizen may be forced to sell his property for its fair value: *Ex parte Martin*, 13 Ark. 198; 58 Am. Dec. 321. What is a public use is an unsettled question, as it depends on the varying condition and wants of society in many cases: *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756. But public use and public benefit are convertible terms: *Aldrige v. Tuscumbia etc. R. R. Co.*, 2 Stew. & P. 199; 23 Am. Dec. 307; *Olmstead v. Camp*, 33 Conn. 532; 89 Am. Dec. 221. The property of a corporation is subject to the right of eminent domain, as well as the property of private persons: *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.*, 11 Leigh, 42; 36 Am. Dec. 374; monographic note to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 137-147, on the condemnation of property of corporations under the power of eminent domain, and showing what, if any, property may be taken; and, as property already devoted to a public use may be taken under eminent domain proceedings, the franchises or property not in actual use of one railroad may be taken for the construction of another, in all cases where the property of an individual might be; but this can be done only upon making compensation therefor, the same as in the case of an individual: *Grand Rapids etc. R. R. Co. v. Grand Rapids etc. R. R. Co.*, 35 Mich. 265; 24 Am. Rep. 545, and note; *Eastern R. R. Co. v. Boston etc. R. R.*, 111 Mass. 125; 15 Am. Rep. 13; notes to *Matter of Board of Street Opening*, 28 Am. St. Rep. 644; *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 144.

In condemning land for a public use, some cases hold that it need not be shown that the taking is "absolutely" necessary: See monographic note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 689, on what uses justify the exercise of the power of eminent domain; but in *Barre R. R. Co. v. Montpelier etc. R. R. Co.*, 61 Vt. 1, 15 Am. St. Rep. 877, it is held that one railroad company has no right to lay its track on the land of another railroad company, unless there is an absolute necessity therefor. That it would be a convenience so to do does not confer the

right. To the same effect is Appeal of Sharon Ry. Co., 9 Am. St. Rep. 133. And there are cases holding that the lands or right of way occupied by one railroad company for its corporate purposes cannot be taken as a right of way by another company, except for mere crossings, and then only for crossing purposes: Note to National etc. Ry. Co. v. State etc. R. R. Co., 26 Am. St. Rep. 431.

One railway company cannot, however, without express statutory authority, acquire for its own use property already acquired by another railway company: Alexandria etc. Ry. Co. v. Alexandria etc. R. R. Co., 75 Va. 780; 40 Am. Rep. 743, and note thereto; note to Grand Rapids etc. R. R. Co. v. Grand Rapids etc. R. R. Co., 24 Am. Rep. 551; unless the appropriation is such as will not essentially injure or interfere with the public use to which the property is devoted: Appeal of Sharon Ry. Co., 9 Am. St. Rep. 144. It is not essential that the public of a whole state or community should be benefited by the use in a particular case to authorize the condemnation of property for a public use: See note to Beekman v. Saratoga etc. R. R. Co., 22 Am. Dec. 689, discussing the question. A railroad is a public use, although the profits arising therefrom may be appropriated to the private use of the company: Lexington etc. R. R. Co. v. Applegate, 8 Dana, 289; 33 Am. Dec. 497; Penn Mutual Life Ins. Co. v. Heiss, 141 Ill. 35; 33 Am. St. Rep. 273, and note. A use may be public though it benefit but a limited portion of the community: Aldrige v. Tuscumbia etc. R. R. Co., 2 Stew. & P. 199; 23 Am. Dec. 307. The development of mines being a public benefit, the magnitude of the industry may be considered in condemnation proceedings involving mining interests: Note to Beekman v. Saratoga etc. R. R. Co., 22 Am. Dec. 704. Where one railway crosses another, the railway first constructed has the prior right to the right of way, and one which is subsequently constructed so as to cross, or parallel, the one already in existence must accommodate itself to the established way of the first. It cannot be constructed so as to overlap such right of way and existing tracks longitudinally, so that the first company cannot use its track during the operation of the road of the last company: Seattle etc. Ry. Co. v. State, 7 Wash. 150; 38 Am. St. Rep. 866. Two or more intersecting railroads should show an attempt to agree upon connections and points of crossing before resort is had to judicial proceedings to condemn a right of way to cross by the later and intersecting road: Seattle etc. Ry. Co. v. State, 7 Wash. 150; 38 Am. St. Rep. 866. Ability to enjoy all its privileges and to perform all its duties in a proper and reasonable manner being secured to a railroad company whose road is crossed by another, the former must, upon being fully compensated for the right of way, submit to the necessary inconvenience and damage which such crossing may occasion: National Docks etc. Ry. Co. v. State, 53 N. J. L. 217; 26 Am. St. Rep. 421. In eminent domain proceedings, damages must be given in all cases: See monographic note to Winona etc. R. R. Co. v. Waldron, 88 Am. Dec. 113-121, discussing damages in eminent domain cases. The damages may be ascertained by a commission prescribed by statute: Beekman v. Saratoga etc. R. R. Co., 3 Paige, 45; 22 Am. Dec. 679.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

UNION PACIFIC RAILWAY COMPANY v. JOHNSON.

[45 NEBRASKA, 57.]

BILLS OF LADING—INDORSEMENT.—Bills of lading are symbols of property, and, when properly indorsed, operate as a delivery of the property itself, investing the indorsee with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property under and in pursuance of the bill of lading and to the parties entitled to receive it.

DELIVERY OF GOODS BY A COMMON CARRIER to the consignee is made at the peril of the carrier, unless, when made, the consignee surrenders the bill of lading either made or indorsed to himself.

BILL OF LADING given for grain, "marked and consigned as noted below, to be transported to — and delivered at the railway depot, on payment of freight charges, together with such charges as have been advanced on the same, Consignee, Brown Bros., Grain Company. Destination, Milwaukee, Wis.," and containing the following notations, "Care Union Elevator, Council Bluffs, Iowa. Stop at Brown Bros. Elevator Company to clean. Transfer at Council Bluffs," is a through bill of lading, and does not authorize a delivery of the grain to a consignee at an intermediate point, without presentation of the bill of lading.

MISDELIVERY—CONVERSION.—A carrier delivering to the consignee at an intermediate point, grain for which it has given a through bill of lading, without the surrender of such bill, is guilty of misdelivery and conversion, for which it is liable to an indorsee for value of the bill of lading.

NEGLIGENCE.—IF ONE OF TWO INNOCENT PARTIES MUST SUFFER, he who by his conduct has enabled a wrongdoer to perpetrate a wrong must bear the loss, rather than the party without fault.

J. M. Thurston and W. R. Kelly, for the plaintiff in error.

John D. Howe and E. R. Duffie, for the defendant in error.

•• RAGAN, C. In the months of October and November, 1891, certain persons, at certain points in the state of Nebraska,

delivered to the Union Pacific Railway Company (hereinafter called the "railway company") for transportation seven cars of grain. The railway company, at the time of such delivery, issued and delivered to said shippers bills of lading for the grain received by it. All said bills of lading were substantially as follows: "Received of—— [the name of the shipper] the following described freight, marked and consigned as noted below, to be transported to ——, and delivered at the railway depot on payment of freight charges, together with such charges as have been advanced on the same." Such bills of lading also contained the following directions and notations:

No. 1. "Consignee, Brown Bros. Grain Co. Destination, St. Louis, Mo." Notation: "Care Union Elevator, Council Bluffs, Iowa."

No. 2. "Consignee, Brown Bros. Grain Co. Destination, St. Louis, Mo." Notation: "Care Union Elevator Co., Council Bluffs."

No. 3. "Consignee, Order Brown Bros. Grain Co. Destination, Milwaukee, Wis." Notation: "Stop at Council Bluffs, Brown Bros. Elevator Co., to clean. Transfer at Council Bluffs."

No. 4. "Consignee, Order Brown Bros. Grain Co. Destination, Milwaukee, Wis." Notation: "Clean at Council Bluffs, Brown Bros. Elevator Co. Transfer at Council Bluffs."

No. 5 "Consignee, Order Brown Bros. Grain Co. Destination, St. Louis." Notation: "Care Union Elevator, Council Bluffs, Iowa."

No. 6. "Consignee, Order Brown Bros. Grain Co. Destination, St. Louis." Notation: "Care Union Elevator, Council Bluffs."

⁶¹ No. 7. "Consignee, Brown Bros. Destination, Milwaukee." Notation: "Care Union Elevator, Council Bluffs."

The grain consisted of oats, barley, and shelled corn. The parties designated as consignee on the bills of lading are sometimes denominated "Brown Bros." and sometimes "Brown Bros. Grain Co.," but Brown Bros. Grain Company was the party intended as the consignee on each bill of lading. The notation, "Union Elevator" and "Brown Bros. Elevator, Council Bluffs," had reference to an elevator located in that city, at that time leased and operated by Brown Bros. Grain Company, the consignee of the grain. It appears from the evidence in the bill of exceptions that, at the time these shipments were made, there was an elevator located in the city of Council Bluffs, Iowa. This elevator was owned by a corporation known as the Union Ele-

vator Company. A contract existed between the elevator company and some five or six railway companies whose roads entered Council Bluffs, that the elevator company, in handling grain which might come into its possession for cleaning or transfer, or both, would not discriminate either in favor of or against either one of the railway companies mentioned. The Union Pacific Railway Company was a party to this agreement. It further appears that Brown Bros. Grain Company, at the time of the shipments in controversy, was the lessee of this elevator, was in possession of it, and operating it. Persons shipping grain from points in Nebraska over the Union Pacific Railway Company's road, and which grain was consigned to Milwaukee or St. Louis, or other eastern points, if they desired, could have said grain stopped at Council Bluffs and cleaned in this elevator; and, if it was desired by the railway company that the car in which such shipment was made should not go farther than Council Bluffs, then the grain would be transferred through this elevator to the cars of the road which was to haul it from there to its place of destination. The railway company did not deliver this grain, or any ^{or} of it, either at Milwaukee or St. Louis, but it transported the grain to Council Bluffs, and there made an unconditional delivery of it to Brown Bros. Grain Company, the party named as the consignee in each of the bills of lading, and made such delivery to such consignee without the consignee's surrendering to the carrier the bills of lading issued by it to the shipper. Brown Bros. Grain Company, it appears, sold this grain to E. P. Bacon & Co., made drafts on them for the value of the grain, and attached to such drafts the bills of lading, each bill of lading being indorsed, "Deliver to the order of E. P. Bacon & Co. Brown Bros. Grain Company. By C. T. Brown, Pt." Bacon & Co., on presentation of the drafts, honored them, and then presented the bills of lading to the railway company and demanded the grain. In the mean time, Brown Bros. Grain Company had failed, and neither they nor the railway company ever delivered the grain to Bacon & Co. At the time Brown Bros. Grain Company indorsed the bills of lading to Bacon & Co., and attached them to the drafts which they drew on them for the value of the grain, the greater part of the grain had already been delivered to them, only one car of the grain being in transit or undelivered to Brown Bros. Grain Company at the time they indorsed said bills of lading and drew said drafts. Bacon & Co. brought this suit against the railway company in the district court of Douglas county for the value of said grain. A jury was waived, and the

case was tried to the court, resulting in a finding and judgment in favor of Bacon & Co., and to reverse this judgment the railway company has prosecuted to this court a petition in error.

1. The bills of lading issued by the railway company to the shippers of this grain were through contracts, under and by which the railway company agreed to transport this grain from the places where it received it to Milwaukee and St. Louis, and there deliver it to the party entitled thereto. The terms of the bills of lading fixing the express ⁶³ destination of this grain and the notations, when explained by the evidence, leave no room for doubt whatever that these bills of lading were through contracts: *Angle v. Mississippi etc. R. R. Co.*, 9 Iowa, 487; *Mulligan v. Illinois Cent. Ry. Co.*, 36 Iowa, 181; 14 Am. Rep. 514; *Ogdensburg etc. R. R. Co. v. Pratt*, 22 Wall. 123; *Beard v. St. Louis etc. Ry. Co.*, 79 Iowa, 527. The notations on the bills of lading, "Care of the Union Elevator, Council Bluffs," "Stop at Council Bluffs to clean." "Transfer at Council Bluffs," meant and mean nothing more than that the grain should go by way of Council Bluffs; some of it should be cleaned there; and some of it should be transferred to other lines or into other cars at that place through the instrumentality of said elevator. Doubtless, it was a contract on the part of the railway company that it would transport said grain to its place of destination by way of Council Bluffs; that it would stop some of the grain at the elevator for the purpose of having it cleaned; and that whatever transfer it might be under the necessity of, or desirous of, making to other carriers in order to complete the transit should be made at that point. But nothing in these bills of lading, including the notations made thereon in reference to the elevator at Council Bluffs, authorizes, or will sustain, a construction that by the bills of lading the railway company agreed to transport this freight only to Council Bluffs, or to make delivery of it there.

2. In the case at bar, the railway company, the carrier, delivered the freight to the consignee named in the bills of lading without such bills of lading having been first surrendered to it. We are not necessarily concerned with the question whether a carrier may, with impunity, deliver goods to the consignee named in the bill of lading, at the place of destination mentioned in such bill of lading, without its surrender, the carrier having no knowledge at the time that such bill of lading has been assigned or transferred. The precise question in this case is, whether the railway company, ⁶⁴ having no knowledge that these bills of lading had been transferred to Bacon & Co., was justified in delivering the grain to the consignee named in the bill of lading

at a point intermediate the place of shipment and the place of destination.

In *Gates v. Chicago etc. R. R. Co.*, 42 Neb. 379, it was held: "The bill of lading issued by a carrier to the owner or shipper is the symbol of ownership of the goods shipped, and, though not negotiable is assignable": See, also, *Furman v. Union etc. Ry. Co.*, 106 N. Y. 579.

In *Pennsylvania R. R. Co. v. Stern*, 119 Pa. St. 24, 4 Am. St. Rep. 626, it was held: "Bills of lading are symbols of property, and, when properly indorsed, operate as a delivery of the property itself, investing the indorsers with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, and to the persons entitled to receive the same": See, also, *Hutchinson on Carriers*, sec. 129; *Forbes v. Boston etc. R. R. Co.*, 133 Mass. 154; *The Thames*, 14 Wall. 98. See, also, *Walker v. Detroit etc. Ry. Co.*, 49 Mich. 446. In this case, a creditor of the consignee attempted to get possession of the property by garnishment proceedings against the carrier. The supreme court of Michigan, however, discharged the carrier from liability on the garnishment proceedings, and held: "Common carriers must recognize transfers of bills of lading and consignments of goods, and, unless protected by proper vouchers, cannot always assume to deal with consignments as actually and beneficially belonging to the consignee."

In *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34, 6 Am. Rep. 28, it was held: "Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, ⁶⁵ either by an innocent person or through fraud of others, they will be responsible, and the wrongful delivery will be treated as a conversion."

In *Hutchinson on Carriers*, section 130, it is said: "The carrier takes the risk of a delivery to the person entitled to the goods by the bill of lading and its indorsements. . . . Too great caution cannot, therefore, be exercised in respect to the right of the person to whom the delivery is made. No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law will allow in fact of no excuse for a wrong delivery except the fault of the shipper himself": See, also, *Hutchinson on Carriers*, secs. 340, 344.

In *Pennsylvania R. Co. v. Stern*, 119 Pa. St. 24, 4 Am. St. Rep. 626, it is said: "A railroad company has no right to make a deliv-

ery of freight, otherwise than in strict accordance with the bill of lading."

In *Gates v. Chicago etc. R. R. Co.*, 42 Neb. 379, it was held: "The delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless, when made, the consignee surrenders the bill of lading, either made or indorsed to himself": See, also, *Louisville etc. Ry. Co. v. Barkhouse*, 100 Ala. 543; *Weyand v. Atchison etc. R. R. Co.*, 75 Iowa, 580; 9 Am. St. Rep. 504.

In the light of these authorities, we conclude: 1. That the railway company, by its bills of lading, contracted to transport the freight to Milwaukee and St. Louis, and there deliver it to the consignee named in the bills of lading, namely, Brown Bros. Grain Company, or, if the bills of lading had been transferred by them, then to the lawful holders of said bills; 2. That Bacon & Co., by honoring the drafts drawn against them by Brown Bros. Grain Company, with said bills of lading attached thereto and assigned to them, became and were entitled to have said grain delivered to them at Milwaukee and St. Louis; 3. That the railway company, by delivering said grain to the ⁶⁶ consignees mentioned in said bills of lading, at a station intermediate the point of shipping and the point of destination, and without the surrender of the bills of lading, was guilty of a misdelivery and conversion of said grain.

3. It is suggested in argument here by the counsel for the railway company that it ought not to be held liable to Bacon & Co. for so much of the grain as was delivered to Brown Bros. Grain Company before they indorsed to Bacon & Co. the bills of lading for such grain. This position we think is untenable. In the first place, the railway company, having issued these bills of lading, would be estopped, as against the assignee and holder thereof for value, from saying that it had never had such grain in its possession: *Sioux City etc. Ry. Co. v. First Nat. Bank of Fremont*, 10 Neb. 556; 35 Am. Rep. 488. And the railway company, having received this grain and undertaken its transportation, by delivering it while in transit to the consignee named in the bill of lading, and without the surrender of such bills of lading at the time, put it in the power of Brown Bros. Grain Company to defraud third parties by selling the grain and indorsing the bills of lading. And the railway company is also liable for this grain, on the familiar principle that where one or two innocent parties must suffer, he who by his conduct has enabled a wrongdoer to perpetrate a wrong must bear the loss rather than the party

without fault: *Walters v. Western etc. Ry. Co.*, 56 Fed. Rep. 369. It was the duty of the railway company, the carrier, before delivering this grain to any person at any place, to take up the outstanding bills of lading which it had issued for it. So long as the bills of lading were outstanding, they were representations by the railway company to the commercial world that it had in its possession and under its control and in transit to Milwaukee and St. Louis the grain for which the bills of lading called.

⁶⁷ There is no error in the record, and the judgment of the district court is affirmed.

BILLS OF LADING—INDORSEMENT—EFFECT.—A bill of lading, regularly, fairly, and for value indorsed to another, will pass the title in the goods to the indorsee: *Decan v. Shipper*, 35 Pa. St. 239; 78 Am. Dec. 334; *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607; *Winslow v. Norton*, 29 Me. 419; 50 Am. Dec. 601; *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195; 27 Am. St. Rep. 861, and note. See, also, the extended notes to *Chandler v. Sprague*, 38 Am. Dec. 419, and *Bank v. Jones*, 55 Am. Dec. 299.

EQUITY.—IF A LOSS MUST BE BORNE BY ONE OF TWO INNOCENT PARTIES, it must be borne by him who occasioned it: *City Nat. Bank v. Kusworth*, 88 Wis. 188; 43 Am. St. Rep. 880, and note; *Wittenbrock v. Parker*, 102 Cal. 93; 41 Am. St. Rep. 172, and note.

BEATRICE v. LEARY.

[45 NEBRASKA, 149.]

JURY TRIAL.—DAMAGES AWARDED LESS IN AMOUNT than the damages testified to, raise no presumption that the jury was influenced by passion or prejudice in making the award.

WATERS—SURFACE.—The rule that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, without liability to an adjoining owner, is subject to the rule that every proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor.

WATERS—SURFACE.—Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, is not answerable to an adjoining proprietor, although he may thereby cause surface water to flow on the premises of the latter to his damage; but if, in the execution of such enterprise, he is guilty of negligence which is the natural and proximate cause of injury to his neighbor, he is accountable therefor.

WATERS—SURFACE.—A city has the right to take such steps, and perform such acts, as, in its judgment, are necessary to protect its streets from surface water; but it must perform such work with ordinary care, and, if guilty of negligence which is the natural and proximate cause of injury to an adjoining lotowner, it is liable therefor.

WATERS—SURFACE.—A CITY, in protecting its streets from surface water, must exercise ordinary care to prevent obstructing a ditch which will result in injury to lotowners by overflow of such water.

WATERS—SURFACE—ESTOPPEL.—Petitioning a city to grade and pave a street does not estop a property owner from claiming damages for the negligent omission of the city to provide suitable outlets for surface water.

MUNICIPAL CORPORATIONS—DRAINAGE.—Negligence may be imputed to a city, and it may be held liable for damages resulting therefrom, if its officers, acting in good faith, adopt an insufficient or defective plan of drainage.

WATERS, SURFACE.—THE ACTS OF A CITY in cutting ditches along streets and in building dikes, are ministerial acts, for which it may be held liable, in case of negligent omission to provide sufficient outlets for surface water.

WATERS, SURFACE—QUESTION FOR JURY.—The sufficiency of the capacity of ditches dug by a city to carry off surface water, and negligence in their construction, are questions of fact for the jury.

E. O. Kretsinger, for the plaintiff in error.

G. A. Murphy, for the defendant in error.

152 RAGAN, C. The Big Blue river runs south through the city of Beatrice, crossing Court street at right angles. The property of Mrs. Ellen Leary, consisting of some city lots and a dwelling-house thereon, is situate on the north side of Court street, and some distance west of where said street crosses said river. Cedar street opens into Court street immediately south of Mrs. Leary's property. One block south of Court street, and parallel thereto, is Mary street, and one block south of Mary street, and parallel thereto, is Scott street. The country to the south and west of Mrs. Leary's property inclines to the north and east to the river. In the summer of 1891, and prior thereto, a draw or swale, heading in the foothills of said river, some miles southwest of where the river intersects Court street, meandered from the hills in a northeasterly direction, and entered Cedar street south of Scott street, thence along Cedar street into Court street immediately south of the Leary property, and there opened into a ditch or gully extending down Court street to the Blue river. It seems from the record that the ditch was an artificial channel that had been made to take the place of the draw which had once extended down Court street to the river. In the summer and autumn of 1891, the city of Beatrice graded and paved Court street west of the river to a point west of the Leary property, and, in doing so, filled up the ditch in Court street through which the waters from the draw or swale above mentioned had been accustomed to find their way to the river. The draw was not a running stream, as that term is commonly understood, although it would seem from the evidence that there was some water in some portions of it during most of the year.

The draw was, in fact, a natural conduit through which the surface waters, resulting from rains and melting ¹⁵³ snows on a large area of country, found their way to the Blue river. Mrs. Leary brought this suit in the district court of Gage county, against the city of Beatrice. She alleged that, in the spring of 1892, the waters came down in this swale or draw from the southwest along Cedar street to Court street, and, being unable to escape to the river, overflowed said street, and flowed on and damaged her property. The ground of negligence alleged by her against the city, and made the basis of her action, was that the city, in grading and paving Court street, filled up said ditch, and failed to provide any outlet for the waters which were accustomed, in times of rains or freshets, to flow down in said swale or draw, and thence escape by said ditch into the river. The city, in addition to a general traverse of the material allegations of the petition as to its negligence, pleaded, as a defense to the action, that the grading and paving of Court street were done upon the petition and request of the abutting property owners of said street—Mrs. Leary being among the number of said petitioners; and that, by reason of her petitioning the city to grade and pave said street in the manner it did, she was estopped from claiming damages against the city resulting from said paving and grading. A further defense was, that the damages sued for were the result of an unprecedented and violent rainstorm and flood of such a character as to be, in contemplation of law, the act of God. Mrs. Leary had a verdict and judgment, to reverse which the city has prosecuted to this court a petition of error.

1. The first contention of the city is, that the damages awarded Mrs. Leary are excessive, and appear to have been given under the influence of passion or prejudice. This contention cannot be sustained. The damages awarded are less than the damages testified to, and, therefore, the amount of the damages raises no presumption that the jury was influenced by passion or prejudice in making the award.

¹⁵⁴ 2. The second contention is, that the verdict is not sustained by sufficient evidence. Two arguments are made in support of this assignment: 1. That the city, prior to its paving and grading Court street, adopted a plan or scheme for the draining of the waters which were accustomed to come down said draw and ditch into the river; and, to carry out this plan, the city constructed dams or dikes across the draw at Scott and Mary streets, and dug ditches along the sides of said streets from the

draw to the river. The sufficiency of these dikes and ditches to accomplish the purposes for which they were constructed was passed upon by the jury, and we cannot say that they came to an incorrect conclusion; 2. The principal argument, however, under this head is, that the finding of the jury, that the damages sustained by Mrs. Leary were not the result of the act of God, is wrong. The evidence on this subject was conflicting, and some of it as extraordinary as the freshet or rainstorm was alleged to be. A large number of witnesses testified, on behalf of Mrs. Leary, that they had lived in the vicinity of Beatrice for a number of years, and that the freshet, or rain, which injured her property, while it was a great rain, was no greater than other rains they had known there, or, in substance, that the rain was not an unprecedented flood, a cloudburst, or waterspout. On the other hand, witness after witness, in behalf of the city, testified it was the most violent flood they had ever known. The testimony of two of these witnesses and their names deserve a place in the piscatorial history of the state. One Frank Thompson testified that, just prior to the rain, he had crossed the draw in question on a pony, and immediately after crossing the draw, it began to rain, and before he could recross the draw, the water had risen in it so high that the pony was compelled to swim and the flood carried the pony and his rider over a wire fence; that after he had succeeded in crossing the draw, he went down to the city—presumably on his pony—and that the flood carried him over more ¹⁵⁵ wire fences; that the draw where he was when the rain began was twelve feet deep and forty feet wide, and that it was filled up with water to the top of its banks in one second. The other witness, Schultz, had a barn near Scott street and the draw. He testified that the water rose in the draw up to the top of the roof of the barn, and did so in five or six minutes. The record does not disclose whether or not the barn was washed away. It is asking too much of this court to disturb the verdict of a jury, based on evidence like the above. We are not fitted by our profession or training for such a task. Only a jury of the vicinage could find the straight and narrow way of truth and dry land in such storms and flood and Cimmerian darkness as this. The district court told the jury that if they believed from the evidence that the damage done to Mrs. Leary's property was the result of excessive, extraordinary, and unusual cloudbursts, rainstorms, and floods, these would constitute, under the law, an act of God, for which the city was not liable, unless they found from the evidence that the negligence of the city contributed in

a "large degree, along with the act of God," to the damage of the plaintiff. This instruction was correct: *Republican etc. R. R. Co. v. Fink*, 18 Neb. 89. The evidence shows that Mrs. Leary's property was damaged by the freshet in the spring of 1892; that she sustained damages equal to the amount awarded by the jury; that her property was damaged by the waters that came down this draw to Court street, and, by reason of the draw being there obstructed and the ditch in the street having been filled, were unable to escape to the river, and overflowed on her property; that this overflow was brought about by the act of the city in damming the draw and filling the ditch in Court street and failing to provide sufficient outlets or ditches down Mary and Scott streets, or elsewhere, to vent these waters. We therefore reach the conclusion that the finding of the jury, that the negligence of the city was the proximate cause of the injury ¹⁵⁰ sustained by Mrs. Leary, has sufficient evidence in the record for its support.

3. Another assignment is, that the verdict is contrary to law. Three arguments are made to support this assignment.

It is first insisted that the city had the lawful right to pave and grade Court street, and that, in doing so, it had a right to defend itself and its property against surface water, the common enemy, by filling the ditch in said street, and diking or damming the draw that emptied into said ditch; and that it is not responsible for any damages that Mrs. Leary may have sustained resulting from its actions in that respect. The doctrine of this court is the rule of the common law, that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, and, if damages result to adjoining proprietors by reason of such defense, he is not liable therefor; but this rule is a general one, and subject to another common-law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor; and, therefore, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if, in the execution of such enterprise, he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor: *Lincoln etc. R. R. Co. v. Sutherland*, 44 Neb. 526, and cases there cited. The city had the right to grade and pave Court street.

It had the undoubted right to fill the ditch therein, and to dike or dam the draw that emptied into said ditch. In other words, it had the right to take such steps and perform such acts as, in its judgment, were necessary to protect its street from surface waters; but, while it had this ¹⁵⁷ right, it was charged with the duty of exercising it with ordinary care. It knew, and was bound to know, that this draw was the natural conduit from which the surface waters from a large area of surrounding country were wont to find their way to the Blue river; and, when it diked this draw at Court street and filled up the ditch in said street, it was charged with the duty of constructing sufficient ditches and outlets to carry the surface waters coming down said draw to the river.

Another argument under this assignment is this: Some time in the spring of 1891, Mrs. Leary and other property owners along Court street petitioned the city of Beatrice to grade and pave said street. The argument is, that the city having complied with this petition, Mrs. Leary is now estopped from claiming damages resulting from such grading and paving. It must be remembered, however, that the basis of Mrs. Leary's action against the city is not that her property was damaged simply because the city graded and paved Court street, but her cause of action is founded—and founded only—upon the alleged negligent omission of the city to provide suitable and sufficient outlets for the surface waters of the draw after the city has dammed it and filled the ditch into which it emptied. To sustain his contention, counsel cite us to *Hembling v. Big Rapids*, 89 Mich. 1, where it was held: "Where plaintiff joined in a petition to the city council to grade and improve a street abutting his lots, paid his assessment for the improvement voluntarily, without objecting to the improvement or the assessment, he is afterward estopped from claiming damages by reason of the improvement, damming the watercourse across the street, and causing the water to flow his lots": To the same effect are *Pontiac v. Carter*, 32 Mich. 164, and *Collins v. Grand Rapids*, 95 Mich. 286. Whatever may be said of these decisions, they are of no force in this state under our constitution, which expressly provides that ¹⁵⁸ private property shall neither be taken nor damaged for public use without just compensation. It may be that if the city, in grading and paving Court street, left Mrs. Leary's property either so far above or below the grade as to damage it, that she, having petitioned the city to bring the street to grade, would be thereby estopped from claiming damages; but that point is not before us,

and we do not decide it. It would be going very far indeed to hold that, because Mrs. Leary petitioned the city council to grade and pave this street, she thereby waived her cause of action against the city for damages it might do to her property in performing the grading and paving in a negligent manner.

The third argument is, that the judgment is contrary to law, because the city adopted a plan for carrying the waters of this draw into the Blue river by building dikes, as already stated, across the draw at Scott and Mary streets, and constructing ditches along said streets from the draw to the river; that the city, in adopting this plan, was exercising legislative functions, and that the city is not liable for any damages that have resulted, although the plan adopted was defective, as it is not liable, in the absence of bad faith, for a mere error of judgment. The authorities on this question are in hopeless conflict. On the one hand, it is held that the adoption of a plan of drainage by a city is a judicial act on the part of its governing body, and that, therefore, the city is not responsible in damages if the plan adopted is insufficient or defective. On the other hand, it is held that the duty of a municipal corporation to provide drains and sewers is ministerial in its character, and not judicial, and that municipal corporations are liable for the safety, sufficiency, and the skillful construction of its sewers and system of drainage. In *Indianapolis v. Huffer*, 30 Ind. 235, it was held: "An incorporated city is not ordinarily liable for consequential injuries to private property, resulting from the grading and improvement of ¹⁵⁹ its streets, if, in making such improvements, reasonable skill and care be used to avoid the injuries. The skill and care which is incumbent relates as well to the plan as to the execution of the work—in the case of a sewer, to its capacity, as well as to the mechanism in its construction." We think this is the better rule. But, to sustain the judgment in this case, it is not necessary to decide whether negligence can be imputed to a city, and it made liable for damages resulting therefrom, because its council, acting in good faith, erred in the plan or scheme of drainage adopted by it. If the city of Beatrice, in adopting the plan it did adopt for conveying the surface waters from the draw in question to the Blue river, exercised legislative functions, if the plan adopted was defective and imperfect, and if the city is not liable because of the adoption of such defective plan, still, the building of the dikes at Scott and Mary streets, the cutting of the ditches along those streets to the Blue river, were ministerial acts; and if the city, in building said dikes and in constructing said ditches, negli-

gently omitted to construct them of sufficient capacity to carry off the waters that were accustomed to flow down said draw, and damages resulted to the plaintiff as the proximate result of such negligent omission, the city was liable. Whether the ditches were properly constructed, and were of sufficient capacity for the purposes intended, were questions of fact; and whether their construction in the manner that they were constructed amounted to negligence on the part of the city was also a question of fact.

4. Some criticisms are indulged by counsel with reference to the instructions given and refused. We have carefully examined the points made by counsel, and reach the conclusion that no error prejudicial to the city was committed by the court in the giving or refusing of instructions. Without desiring or intending any reflection whatever upon the learned judge who tried this case, or of the eminent counsel engaged therein, we deem it our duty to say ¹⁶⁰ that we think the jury in this case was instructed too much. At the request of the plaintiff, the court gave the jury twelve instructions; at the request of the city fifteen; and, in addition to these, there were six paragraphs or instructions in the charge given by the court to the jury on its own motion. Instructions in a case should be few in number, and should present to the jury the law applicable to the issues in the case in simple language and terse sentences. Numerous instructions, or instructions with long and involved sentences, are more likely to confuse the jury and lead it astray than to enlighten it and direct it to the material points of the case.

The judgment of the district court is affirmed.

WATERS—SURFACE—RIGHT OF OWNER TO PROTECT HIMSELF AGAINST.—An owner of land has the right to obstruct and hinder the flow of mere surface water upon his land from the land of another, and may even turn the same back upon his neighbor without incurring liability: *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 205; 49 Am. St. Rep. 249, and note.

SURFACE WATERS—DISCHARGE OF UPON LAND OF ANOTHER.—One cannot collect surface water, and lawfully discharge it injuriously upon the land of another: *Kansas City etc. R. R. Co. v. Lackey*, 72 Miss. 881; 48 Am. St. Rep. 589, and note; but in *Mayor v. Sikes*, 94 Ga. 30, 47 Am. St. Rep. 132, it was held that, at common law, surface water, like the waters of the sea, was regarded as a common enemy, and any landowner had the right to expel it from his own land without regard to the injury thereby occasioned to another proprietor: See, also, the note to *Kansas City etc. R. R. Co. v. Smith*, 48 Am. St. Rep. 588.

MUNICIPAL CORPORATIONS.—DUTY TO FURNISH AND KEEP IN REPAIR OUTLETS for surface waters, and their liability for injuries caused by a negligent failure to do so, is fully treated in the extended note to *Chalkley v. Richmond*, 29 Am. St. Rep. 737-744.

**OMAHA AND REPUBLICAN VALLEY RAILWAY COMPANY
v. HALE.**

[45 NEBRASKA, 412.]

PENALTIES.—AN INFORMER CANNOT bring in his own name, nor control when brought, an action to recover a statutory penalty, unless authorized to do so by statute.

PENALTIES.—An action to recover a penalty from a railroad company, cannot be brought or maintained by an informer, under a statute simply imposing such penalty on the company, for failing to ring a bell or sound a whistle at a crossing, half of the penalty to go to the informer, and half to the state.

J. M. Thurston, W. R. Kelly, and E. B. Smith, for the plaintiff in error.

Pound & Burr and R. Pound, for the defendant in error.

W. H. Woodward, for Lancaster county.

412 RAGAN, C. James B. Hale, suing for himself and the state of Nebraska, brought this suit in the district court of Lancaster county, against the Omaha and Republican Valley Railway Company, to recover the penalty denounced by section 104, 420 chapter 16, of the Compiled Statutes of 1893, against corporations owning railroads that had neglected to sound a whistle or ring a bell at railroad and street crossings. The petition contained seventy-six causes of action, substantially alike, and prayed judgment as follows: "Wherefore, the plaintiff prays judgment against the defendant for the sum of three thousand eight hundred dollars and costs of suit." Hale had a verdict and judgment, and the railroad company has prosecuted to this court a petition in error. The section of the statute on which this action is based (said section 104) is as follows: "A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect." Can the informer mentioned in said statute maintain an action in his own name to recover the penalty provided for therein? There seems to be some conflict among the authorities on this question.

In *United States v. Laescki*, 29 Fed. Rep. 699, it was held that such an action must be brought in the name of the informer, and that the penalty could not be recovered by indictment at the instance of the government. But the statute on which that action was predicated provided: "Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable, one-half to the use of the informer." The word "recoverable" in this statute would seem to authorize a suit for the penalty by the informer.

Chicago etc. R. R. Co. v. Howard, 38 Ill. 415, was an action brought by Howard, suing for himself and the ⁴²¹ state of Illinois, against the railroad company. The statute on which the action was based provided that, if the railroad company should fail to sound a whistle or ring a bell, etc., "it shall forfeit a penalty of fifty dollars, one-half to the informer and the other half to the state." It is to be observed that this statute is almost identical with ours. The court held that the suit was properly brought in the name of Howard.

In *Lynch v. Steamer "Economy"*, 27 Wis. 69, it was held that the informer might maintain an action in his own name for the penalty. The court said: "The action is evidently a *qui tam* action, and, we are inclined to hold, may be brought in the name of the complainant (informer) alone. It is a general rule that a common informer cannot sue for a penalty, unless authorized so to do by statute; but many cases hold, where the statute gives the forfeiture, or a part of it, 'to any person who shall prosecute therefor,' that this, or equivalent language, confers express authority upon him to sue in his own name. . . . But, if there were any doubt upon this point, it is removed by the language making the penalty a demand or lien against the boat, 'to be sued for and collected in the manner provided' for the collection of demands against boats and vessels. This language, we think, shows that the statute contemplated that the complainant (informer) should be the plaintiff in the action, and that the proceeding should be analogous to an ordinary suit for the collection of a demand against a vessel."

The statute of Arkansas provided that railroad companies should cause a whistle to be sounded or bell rung, etc., "under a penalty of two hundred dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer and the other half to the county," etc. One Bell sued in his name, for the use of the state of Arkansas and Miller county, a railroad company, to recover the penalty provided for

by said statute. ⁴²² The court said: "The demurrer to the complaint was properly sustained, as it showed that the plaintiff was not, and that the state was, the party entitled to prosecute the action": *St. Louis etc. Ry. Co. v. State*, 56 Ark. 166.

In *Nye v. Lamphere*, 2 Gray, 295, the court sustained a suit brought by an informer in his own name to recover a statutory penalty, but the statute on which the action was based provided that the penalty was "to be recovered in any court proper to try the same, one-half to the use of the said town and the other half to any person who shall prosecute therefor." This statute expressly conferred authority on the informer to prosecute the action. The court said: "The defendant's objection to the maintenance of this action is, that the plaintiff is an informer, and therefore cannot sue in his own name, because authority so to sue is not given him by statute. And, undoubtedly, it is a general rule that a common informer cannot sue for a penalty, without express statute authority. . . . But by what terms in a statute is such authority conferred? Certainly, by terms like those used in the statute on which this action is brought; namely, by giving the forfeiture, or a part of it, 'to any person who shall prosecute therefor.'"

In *Higby v. People*, 4 Scam. 166, a suit was brought to recover a penalty in the name of the people. The statute provided that the penalty sued for should go to the informer and the county; and the court held that the state had no interest in the recovery; that "the statute not authorizing the suit to be instituted in the name of the people, it was improperly brought, and the court erred in not dismissing it."

In *Colburn v. Swett*, 1 Met. 232, it was held: "As a general rule, a common informer cannot maintain an action for a penalty, unless power is given to him for that purpose by statute."

In *Fleming v. Bailey*, 5 East, 313, it was held ⁴²³ that at common law an informer could not sue in his own name to recover a penalty; that he had no right to maintain an action for a penalty, except such right was conferred by statute: To the same effect see *Barnard v. Gostling*, 2 East, 569.

These authorities, we think, without serious conflict recognize this rule: An informer cannot maintain an action in his own name to recover a penalty, unless authorized so to do by statute. The statute on which this action is based does not expressly authorize the penalty denounced by said statute to be sued for and recovered by an informer, nor does the statute contain any language from which such an authority may be inferred. The act

provides that the penalty shall be paid by the corporation owning the railroad. Paid to whom? We think, paid to the state. The corporation, by violating the law, forfeited to its sovereign, the state, not to the informer, the penalty denounced by the act. It is true that the law holds out an inducement to the citizen to inform the officers charged with the execution of the law of its violation, and, in effect, offers the informer a reward for his information; but it does not authorize the informer to bring the action, nor, when brought, to control it.

Counsel for the defendant in error insist that section 617 of the Code of Civil Procedure authorizes an informer to maintain an action for the penalty in his own name, or, at least, that said section is a legislative recognition of the right of an informer to maintain a suit. The section is as follows: "If any informer, under a penal statute, to whom the penalty, or any part thereof, if recovered, is given, shall dismiss his suit or prosecution, or fail in the same, he shall pay all costs accruing on such suit or prosecution, unless he be an officer whose duty it is to commence the same." We think this argument is untenable. If a statute fixes a pecuniary penalty for its violation, and gives a part of such penalty to an informer, and if the statute, or some other, ⁴²⁴ authorizes such informer to maintain an action in his own name for such penalty, then, by the section of the code referred to, if such informer should bring his action and dismiss it or fail in the same, he would be liable for the costs. The statute on which the case at bar is based is one highly penal in its nature, and it must be strictly construed; and since this statute, nor any other, neither expressly, nor by implication, authorizes the penalties prescribed therein to be sued for and recovered by the informer, we hold that Hale cannot maintain this action.

The judgment of the district court is reversed and the action dismissed.

Qui tam Actions; Rights of Informer.

Qui tam Actions to recover a penalty given by statute are civil, and not criminal, in their nature. They may be appealed in the same manner as other civil actions; and, in prosecuting them, the plaintiff is required to produce the same amount of evidence, namely a preponderance; and he need not make out a case against the defendant beyond a reasonable doubt: *Hitchcock v. Munger*, 15 N. H. 97; *President etc. of Jacksonville v. Block*, 36 Ill. 508; *Canfield v. Mitchell*, 43 Conn. 169; *Spicer v. Rees*, 5 Rawle, 119; 28 Am. Dec. 648; *State v. Hannibal etc. R. R. Co.*, 30 Mo. App. 494.

As penal statutes are always strictly construed, great strictness is required, both in the pleadings and in the evidence, in order to maintain an action *qui tam*; and usually the same strictness is required as is exacted in maintaining proceedings by indictment or information:

Fairbanks v. Antrim, 2 N. H. 105; **Kirkpatrick v. Stewart**, 19 Ark. 695; **Morrell v. Fuller**, 7 Johns. 402; 8 Johns. 218.

Right of Informer to Maintain Suit.—It was undoubtedly a rule of the common law that an informer could not sue in his own name for a penalty. This rule has been, however, so far modified or abrogated in the United States that it is generally held, that a common informer may sue for and recover a penalty to which he is entitled to a portion, unless the statute imposing the penalty expressly directs that the state, or someone else, shall be a party plaintiff to an action *qui tam* to recover the penalty: **Lynch v. Steamer "Economy,"** 27 Wis. 69; **Burrell v. Hughes**, 116 N. C. 430; **Chicago etc. R. R. Co. v. Howard**, 38 Ill. 414; **Cloud v. Hewitt**, 3 Cranch C. C. 199; **State v. Bishop**, 7 Conn. 181; **Nye v. Lamphere**, 2 Gray, 294; **Myers v. Van Alstyne**, 10 Wend. 99; **Vandeventer v. Vancourt**, 2 N. J. L. 168; **Phillips v. Bevans**, 23 N. J. L. 373; **Colgate v. Hill**, 20 Vt. 56; **Megargell v. Hazelton Coal Co.**, 8 Watts & S. 342; **Ryder v. Hulscher**, 40 Ill. App. 77; **United States v. Laescki**, 29 Fed. Rep. 699; **Winne v. Snow**, 19 Fed. Rep. 507.

The decisions, however, are not harmonious, some of them sustaining, or even requiring, action by the informer in his own name. In **Higby v. People**, 4 Scam. 166, a suit was brought to recover a penalty, in the name of the people. The statute provided that the penalty sued for should go to the informer and the county. The court held, that the action should have been brought in the name of the informer, that the state had no interest in the recovery, and that the statute not authorizing the suit to be instituted in the name of the people, it was improperly brought, and that the court erred in not dismissing it. In **Burrell v. Hughes**, 116 N. C. 431, it was held that the person suing for the penalty is the proper party plaintiff, and not the state, unless so expressed in the statute: **Middleton v. Wilmington etc. R. R. Co.**, 95 N. C. 167. A statute, by simply making one-half of a penalty payable to the complainant, authorizes him to bring the action in his own name alone: **Lynch v. Steamer "Economy,"** 27 Wis. 69. If the statute gives the forfeiture, or a part of it, "to any person who shall prosecute therefor," or if equivalent language is used, this confers express authority upon the informer to sue for the penalty in his own name: **Nye v. Lamphere**, 2 Gray, 295; **Middleton v. Wilmington etc. R. R. Co.**, 95 N. C. 167; **Sutton v. Phillips**, 116 N. C. 502; **Drew v. Hilliker**, 56 Vt. 641. A *qui tam* action to recover a penalty and damages for making a false claim against the United States may be commenced by any person in his own name, without the previous authority or consent of the United States district attorney, and the complaint in such action need not be subscribed by such district attorney: **United States v. Griswold**, 5 Saw. 25. A *qui tam* action is properly brought by the informer, who sues for the people as well as himself: **McNair v. People**, 89 Ill. 441. In **Commonwealth v. Davenger**, 10 Phila. 478, it was held that an informer must be named as plaintiff, suing for himself as well as for the people, and in **Winne v. Snow**, 19 Fed. Rep. 507, it was decided that the plaintiff might properly describe himself as bringing the action for the benefit of himself and of the people; but that, in such cases, the people were not to be regarded as party to the action, and that a demurrer for nonjoinder or misjoinder of parties, because the people are not named, cannot be sustained.

In some jurisdictions, the courts, relying upon common-law cases, adhere to the common-law rule, that a common informer cannot maintain an action *qui tam* to recover a penalty, unless express power is given to him for that purpose, by the statute: **Seward v. Beach**, 29 Barb. 239; **Colburn v. Swett**, 1 Met. 232; **Smith v. Look**, 108 Mass. 139; **McDaniel v. Gate City Gas Light Co.**, 79 Ga. 58; **St. Louis etc. Ry. Co. v. State**, 56 Ark. 166. In **Smith v. Look**, 108 Mass. 139, the court said that "the statute which these defendants are charged with having violated provides that one-half of the money recovered as a penalty, in any case arising under the laws relating to inland fisheries, shall be paid to the

person making the complaint in the case in which the same is recovered, and the remainder to the commonwealth. Any person may make the complaint, but the statute does not necessarily import that he is, for that reason, to superintend and control the prosecution. On the contrary, the statute strongly implies that his rights begin when the penalty is recovered, and that, when the money is actually recovered, some public officer, acting for the commonwealth, is to see that one-half of it is paid to him. The natural import of the language is, that the enforcement of the penalty, and the recovery and collection of the money, are to be managed and controlled by somebody else, and not by himself. An interest in the penalty, when recovered, is a different thing from a right in the complainant or informer to bring an action for the penalty in his own name. It is a general rule that no such action can be maintained by the informer, unless power is given him by the statute for that purpose. The statute in question does not, in express terms, give a right to any private prosecutor to bring an action in his own name, nor does it, in our judgment, by any necessary implication. When no such right is given to any individual or body of individuals, then, as the right to enforce all penalties, made to insure obedience to general laws, is in the commonwealth, they are to be prosecuted by the commonwealth. A *qui tam* action is a well-established remedy, which is to be resorted to only in cases where it is expressly given": *Smith v. Look*, 108 Mass. 141. When the statute does not, in terms, declare in whose name a suit shall be brought to recover a penalty for its violation, it must be brought in the name of the people, and not in the name of the informer: *People v. Young*, 72 Ill. 411. When an action to recover a penalty is prosecuted by the informer in his own name, the error in not bringing the action in the name of the state cannot be cured by amendment, substituting the state as plaintiff: *St. Louis etc. Ry. Co. v. State*, 56 Ark. 166. As we have shown above, these cases are contrary to the general rule.

Rights of Informer, Generally.—When a statute prohibits an act under a penalty, and gives one-half of it to the public and the remainder to a common informer, the state may prosecute for the whole, unless a common informer has commenced a *qui tam* suit for the penalty: *State v. Bishop*, 7 Conn. 182; *Commonwealth v. Howard*, 13 Mass. 221; *Inhabitants of Wiscasset v. Trundy*, 12 Me. 204; *State v. Smith*, 49 N. H. 155; 6 Am. Rep. 480. And the common informer cannot recover the penalty, unless he sues within the period allowed by the statute imposing it. After that, the right of the informer is gone, and the state is the only party who can maintain the suit: *Fagan v. Armistead*, 11 Ired. 433. Although a common informer may bring an action generally in his own name, yet, when the penalty is either given partly to the state, the poor of the township, or others, "he must declare specially *qui tam*, in order that the interest of those who have rights may appear of record and be asserted": *Vandeventer v. Vancourt*, 2 N. J. L. 168. It must appear of record who the prosecutor is in order to entitle him to his share of the penalty; otherwise the whole penalty goes to the state: *State v. Smith*, 49 N. H. 155; 6 Am. Rep. 480. In a *qui tam* action, the judgment should be rendered in favor of the informer for the uses expressed in the statute, and it is error to render judgment in favor of the state: *Doss v. State*, 6 Tex. 433. The person bringing an action to recover a penalty is bound to show some authority upon which suit is brought; otherwise he cannot recover: *Seward v. Beach*, 29 Barb. 239. And an action cannot be maintained by several persons jointly as common informers, unless the statute imposing the penalty expressly authorizes such a proceeding: *Commonwealth v. Winchester*, 3 Pa. L. J. Rep. 34.

An action *qui tam*, where part of the penalty goes to the county, cannot be released by the plaintiff, when the action is brought in his name, nor in any way compounded without leave of the court and the assent of the county attorney, who, notwithstanding any adjustment made by the parties, has a right to proceed with the case until the pen-

alty is paid: *Burley v. Burley*, 6 N. H. 200. But if the action is brought in the name of the people, a nonsuit may be granted in favor of defendant, with the consent, or on the motion, of the prosecuting attorney, and against the objection of the common informer: *State v. Smith*, 49 N. H. 155; 6 Am. Rep. 480; *Wheeler v. Goulding*, 13 Gray, 539. In *Caswell v. Allen*, 10 Johns. 118, it was held that when a statute inflicted a penalty, one-half thereof, when recovered, to be paid into the state treasury, and the other half to go to the benefit of the person prosecuting, payment to the person prosecuting discharges the defendant thus paying the penalty, though the plaintiff has no right to discharge the judgment, or compound with the defendant, without leave of court. In such case, the plaintiff is a trustee for the state as to the half of the penalty thus collected by him, and to which he is not entitled. The informer who prosecutes the suit to judgment may release his half thereof, if that is his share of the penalty, but he cannot release the other half, which belongs to state, county, or other person: *Wardens of the Poor v. Cope*, 2 Ired. 44.

If a statute imposes a penalty for taking fish, and gives an action of debt *qui tam* for its recovery, and several join in taking the same fish, a recovery and satisfaction against one of the offenders is a bar to an action against the others: *Boutelle v. Nourse*, 4 Mass. 431.

Vested Rights.—The person who first commences a *qui tam* action to recover a penalty given by statute attaches a right in himself to the penalty, which cannot be divested by a subsequent suit, brought by any other common informer, though judgment has been first recovered in such subsequent suit, and though the statute declares that a recovery for the penalty shall be a bar to all prosecutions for the same offense. This latter provision must be construed as relating to a recovery in the suit first commenced: *Beadleston v. Sprague*, 6 Johns. 101; *Pike v. Madbury*, 12 N. H. 262.

An informer who commences a *qui tam* action to recover a penalty imposed by statute does not thereby acquire any vested right to the forfeiture until his claim is fixed by judgment. Prior to its rendition his right is inchoate only: *Bank of St. Mary's v. State*, 12 Ga. 475; *Confiscation cases*, 7 Wall. 454. Hence the prosecuting attorney may ask for, and obtain, a dismissal of the action at any time, against the interest and objection of the informer. Such dismissal may be asked for by the former, either before judgment in the lower court, or after appeal from that judgment by either party: *Confiscation cases*, 7 Wall. 454; *State v. Smith*, 49 N. H. 155; 6 Am. Rep. 480. Under the internal revenue laws of the United States, the right of the informer to his share of a penalty becomes fixed only after judgment, and when the money representing the forfeited property has been paid over to the marshal and is ready for distribution: *About 25,000 Gallons of Distilled Spirits*, 1 Ben. 387. But the informer has a vested right to his share of the penalty as soon as the money is thus paid to the marshal: *Eight Barrels of Distilled Spirits*, 1 Ben. 472; *United States v. 25,000 Segars*, 5 Blatchf. 500.

If a statute imposing a penalty to be recovered in an action *qui tam* is repealed before judgment in an action commenced under it is rendered, the action abates, and the repeal prevents the inchoate right of the informer to the penalty from becoming vested. It is competent for the legislature to pass such repealing statute at any time before final judgment: *Bank of St. Mary's v. State*, 12 Ga. 475.

**SHELLENBERG v. FREMONT, ELKHORN & MISSOURI
VALLEY RAILROAD COMPANY.**

[45 NEBRASKA, 487.]

BAILMENT—RIGHT OF OWNER TO GOODS.—The owner of personal property in the hands of a common carrier or other bailee may enforce his right thereto, although a stranger to the bailment.

BAILMENT.—A BAILEE MAY EXCUSE nondelivery to the bailor, of the property constituting the bailment, by proof that he has delivered it to the rightful owner.

CARRIERS.—THE REFUSAL OF A COMMON CARRIER to surrender goods in its possession to the rightful owner constitutes a conversion, for which he may recover, if entitled to possession at the time of his demand.

REFUSAL TO SURRENDER GOODS—BURDEN OF PROOF. In an action against a common carrier, or other bailee, to recover for refusal to surrender the property in its possession to a person other than the bailor, claiming to be the owner, the burden of proof is upon such claimant to establish his right to the property.

REFUSAL TO SURRENDER GOODS—INTERPLEADER.—In an action against a carrier, or other bailee, to recover for the refusal to surrender the goods to a person other than the bailor, claiming to be the owner, the bailee may, by answer in the nature of an interpleader, require the claimants to litigate and determine the question of title between themselves.

Wigton & Whitham, for the plaintiff in error.

J. B. Hawley, B. T. White, and J. B. Barnes, for the defendant in error.

489 POST, J. This was an action in the district court for Madison county, by the plaintiff in error, to recover from the defendant in error for the conversion of a carload of potatoes. On the conclusion of the plaintiff's case, the district court directed a verdict for the defendant, to which exception was taken, and, judgment having been entered thereon, the cause has been removed into this court for review by means of a petition in error.

It is shown by the evidence in the bill of exceptions that about October 9, 1890, the plaintiff agreed to sell to one Day a carload of potatoes, to be delivered at Hoskins, a station on the Chicago, St. Paul, Minneapolis, & Omaha railway, in Wayne county. At the time mentioned, the plaintiff requested Day to pay some money on the potatoes to insure his taking them, to which the latter replied that he had already sold them, and would have to take them. October 13th said Day drew a check in favor of the plaintiff, or order, bearing date of October 17th, on the first National Bank of Deadwood, South Dakota, for three hundred and seventy-five dollars, the contract price of the potatoes,

and informed the latter that it would be cashed by the Norfolk National Bank in the city of Norfolk. The car containing the potatoes, which was then on the side track ready for shipment, was, by Day, immediately consigned to the First National Bank of Deadwood, at Whitewood, South Dakota, the western terminus of the defendant's line of road. A bill of lading for the potatoes was delivered by the railroad company to Day, to which the latter attached a sight draft, drawn in his own favor, and forwarded it to the consignee bank for collection, but the drawee therein named having refused to pay the draft upon presentation, the bank, in the language of the cashier, "refused to have anything to do with the ⁴⁹⁰ potatoes." October 15th, the Norfolk bank having refused, on presentation thereof, to cash the check drawn by Day to the plaintiff's order, the latter served the defendant, to whom the said car had in the mean time been delivered as a connecting carrier, with written notice to the effect that the potatoes mentioned had been procured by said Day through fraud and false representations, and demanded that they be held by the defendant subject to his, plaintiff's, order. Previous to the receiving of said notice, the potatoes in controversy had been forwarded from Norfolk by the defendant company, and were then some place between said city and the point of their destination. October 18th the check above mentioned, which had, at plaintiff's request, been forwarded to the Deadwood bank for collection and return, was protested for nonpayment. October 23d plaintiff, by his attorney, tendered to the defendant's agent at Whitewood the amount of its charges, including charges for unloading and storing, and demanded the potatoes, which demand was refused, unless the plaintiff would surrender the bill of lading therefor.

The single question presented is, whether the defendant, as a common carrier of property, was bound, at its peril, to determine which of the rival claimants of the property was the rightful owner. It was formerly held that, where a bailee of goods delivered them to the rightful owner, he would, notwithstanding that fact, be answerable to the bailor without title thereto. The reason for the rule was, that a bailee, having recognized the bailor as the owner, should not be permitted to dispute the latter's title; but, according to the modern rule as recognized in this country and in England, it is a sufficient excuse for the nondelivery of personal property for the bailee to show that he has surrendered it to the rightful owner: *Hutchinson on Carriers*, 404; *Western Transfer Co. v. Barber*, 56 N. Y. 544; *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670; *Hardman v. Willcock*, 9 Bing. 388;

Cheesman v. Exall, 7 Ex. ⁴⁹¹ 341; **Wells v. American Express Co.**, 55 Wis. 23; 42 Am. Rep. 695; **American Express Co. v. Greenhalgh**, 80 Ill. 68; **Wolfe v. Missouri Pac. Ry. Co.**, 97 Mo. 473; 10 Am. St. Rep. 331; **The "Idaho,"** 93 U. S. 575. The reasoning upon which the modern doctrine rests is, that the obligation of the bailee is to restore the property, or to account for it, and that he has, in legal contemplation, accounted for it when he has delivered it to one whose title and right of possession is paramount to that of his bailor. He may, in brief, if he choose, yield possession to a stranger claiming the property, by taking the risk of establishing the title thus recognized. It is well established that a delivery of goods to the consignee before the carrier is made aware of the rights of a rival claimant thereto, is a complete extinguishment of its liability, although such claimant may be in fact the rightful owner: **Sheridan v. New Quay Co.**, 4 Com. B. 93; **Hutchinson on Carriers**, 408; since, as remarked by the author last cited, any other rule would be an "intolerable hardship upon the carrier."

On the question of the duty of a common carrier or other bailee at its peril to determine between the bailor and a third party claiming title, the authorities are less numerous than the importance of the subject would seem to suggest, although the pronounced weight thereof sustains the proposition that a refusal to surrender to the rightful owner amounts to a conversion, for which the latter may recover, if entitled to possession at the time of his demand. In **Wells v. American Express Co.**, 55 Wis. 23, 42 Am. Rep. 695, a well-considered case, Judge Orton, after asserting the liability of the carrier, says: "This principle obtains in all cases of bailment, and the *jus tertii* may be enforced, even as against the contract of bailment, and, when enforced, will be made available to excuse and protect the bailee from the performance of delivery according to its terms, and it is founded in reason, as well as sustained by a great preponderance of authority. There can be no distinction between its application in case the bailor or consignor seeks to reclaim the ⁴⁹² property from the bailee or carrier and in case the consignee seeks its delivery, for the rights of all the parties to the contract must yield to the paramount right of the real owner of the property." It is also said in the same opinion: "When the liability of the express company to respond to the claim of a third person as the exclusive owner of the property against the terms or directions of the consignment for delivery to another, or for delivery to himself and another, is established by law as now seems clear, it follows

that such third person should recover in an action against the company upon proof of his ownership." The proposition there asserted finds support in the following authorities: *Western Transp. Co. v. Barber*, 56 N. Y. 544; *The "Idaho,"* 93 U. S. 575; *Hutchinson on Carriers*, 406, 407. We have been referred to a single case at variance with the above doctrine, viz., *Kohn v. Richmond etc. R. R. Co.*, 37 S. C. 1, 34 Am. St. Rep. 726, in which, with one judge dissenting, the liability of the defendant was denied. The reasons upon which that case rests are shown by the following quotation: "It seems to us that common justice would require that such burden should be assumed by the claimant, who is most likely to have the means of meeting it, and not upon the carrier, who cannot be supposed to know anything about the real ownership of the goods, and had a right to assume that the person from whom he received possession of the goods was such rightful owner, possession of personal property being evidence of title." There is no doubt that the assertion of conflicting claims has been the occasion of frequent embarrassment to bailees, particularly common carriers, who are bound to receive goods offered for transportation, although there has been suggested no sufficient reason for excepting them from the operation of the rule by which the rightful owner is permitted to reclaim property wherever found. We are aware of exceptions to the rule, but they rest upon equitable considerations, none of which are presented by the record in ⁴⁹³ this case, and need not, therefore, be noticed; but whatever may have been the embarrassment and inconvenience of the bailee under the former practice, his remedy under our system, by an answer in the nature of a bill of interpleader, thus making the adverse claimant a party to the controversy, and requiring such claimants to litigate the question of title between themselves, is ample and complete.

It follows that, in directing a verdict for the defendant, the district court erred, for which the judgment must be reversed and a new trial awarded.

CARRIERS—DUTY TO DELIVER GOODS TO TRUE OWNER ON DEMAND.—A common carrier receiving goods for transportation, with a bill of lading therefor, is not bound to deliver them upon demand to a third person claiming to be their true owner, and a refusal to so surrender will not make the carrier liable for the conversion of such goods at the suit of such third person. In such case, he may, however, if he chooses to do so, deliver the goods to the rightful owner, and then defend an action brought against him by his bailor to recover for their nondelivery by showing such delivery: *Kohn v. Richmond etc. R. R. Co.*, 37 S. C. 1; 34 Am. St. Rep. 726, and extended note. This subject is further discussed in a note to *Fitch v. Newberry*, 40 Am. Dec. 44.

STATE BANK v. MATHEWS.

[45 NEBRASKA, 659]

MORTGAGES.—A DEED ABSOLUTE IN FORM is, in fact, a mortgage, when given to secure the payment of money, although the parties may have agreed that, upon default in payment, the deed should become absolute.

MORTGAGES—ASSIGNMENT.—If the grantee in a deed given to secure the payment of notes sells the notes to a third person, and gives him a mortgage on the land named in the deed to secure their payment, the last mortgage constitutes an assignment to such third person of the mortgage deed.

MORTGAGES—ASSIGNMENT OF PART OF NOTES SECURED.—If a mortgage secures several notes, the assignment of one of them is an assignment, pro tanto, of the mortgage, and, in the absence of any stipulation to the contrary, all of the notes so secured share pro rata in the distribution of the fund upon foreclosure.

CORPORATIONS—NOTICE.—AN OFFICER OF A BANK, dealing with it in his individual interest and capacity, does not charge it with notice of facts within his knowledge, and not communicated to the other bank officers.

MORTGAGES—ASSIGNMENT OF NOTES.—If the holder of notes secured by the same mortgage transfers part of them to one party by general indorsement, and the remainder to another without recourse, all of the notes are entitled to share pro rata in the distribution of the fund realized upon foreclosure; and the fact that some of them were transferred before the others does not imply any agreement that the notes first transferred shall have priority.

H. M. Uttley, for the appellant.

T. Carlon, for the appellee.

660 **IRVINE, C.** One Donald McLean made and delivered to W. D. Mathews four promissory notes, each dated December 31, 1890, one for two thousand dollars, payable ninety days after date, one for fifteen hundred dollars payable five months after date, one for fifteen hundred dollars, payable six months after date, and one for five thousand dollars, payable eight months after date. To secure these notes, he conveyed, by deed absolute in form, certain real estate to Mathews. The pleadings on both sides admit that this conveyance was made as security, and it was, therefore, a mortgage, in spite of its form. A few days thereafter, Mathews sold the three notes first to mature to the State Bank of O'Neill, of which Mathews was president, and at the same time executed to that bank an instrument in the form of a mortgage on the land conveyed to him by McLean. This mortgage was conditioned to secure all four notes. The three notes sold were indorsed by McLean generally. Still later, McLean, in part payment of a debt to the Thomson-Houston Company, indorsed the remaining note without recourse to that company. After the maturity of the notes, the bank instituted fore-

closure proceedings, making the Thomson-Houston Company a party defendant. A decree of foreclosure was rendered, and the land sold, not realizing enough to pay all the notes. The decree had not fixed the order of payment, but directed the purchase money to ⁶⁶¹ be brought into court. After this was done, the bank applied for an order distributing the money, and giving it priority. The court refused this order, but instead thereof directed the money, after payment of costs, to be divided pro rata between the bank and the electric company. From this order the bank appeals.

As we have said, the conveyance from McLean to Mathews must be treated as a mortgage, and this notwithstanding the fact that McLean testifies that the agreement was, that if the first note was not paid the deed should become absolute. This was the understanding, and is the legal effect of all mortgages, and the whole doctrine of foreclosure and redemption arose from courts of equity relieving against this understanding and its legal effect. This deed being a mortgage, the mortgage made by Mathews to the bank must be considered merely as an assignment of the mortgage from McLean to Mathews. It therefore cuts very little figure. The mortgage is but an incident to the debt, and, by an assignment of the debt, the mortgage passes to the assignee: *Webb v. Hoselton*, 4 Neb. 308; 19 Am. Rep. 639. It has also been held that where a mortgage secures several notes, the assignment of one of the notes is an assignment pro tanto of the mortgage, and that, in the absence of any stipulation to the contrary, notes so secured share pro rata in the distribution of the fund: *Studebaker v. McCargur*, 20 Neb. 500; *Harman v. Barhydt*, 20 Neb. 625; *Todd v. Cramer*, 36 Neb. 430; *Whipple v. Fowler*, 41 Neb. 675. Without considering the correctness of this rule, it is sufficient to say that it has been for many years established in this state. It has become a rule of property, and it will not now be disturbed. Is there anything in this case to take it out of the rule?

There is some argument on either side addressed to the position of the parties as being purchasers without notice. All these considerations may be dismissed. It is true that Mathews, dealing with the bank in his individual interest ⁶⁶² did not charge the bank with notice of facts within his knowledge, and not communicated to other officers: *Koehler v. Dodge*, 31 Neb. 328; 28 Am. St. Rep. 518. But the bank had notice otherwise. It appears from McLean's testimony, which is all the evidence in the case, that he had expected to sell all four notes to the bank, but the

bank declined to take more than three; therefore, the bank had knowledge of the existence of the four notes, and the mortgage made by Mathews to the bank described all the notes, and in that way charged the bank with notice: *Studebaker v. McCargur*, 20 Neb. 500. Nor can the electric company claim anything as a purchaser without notice, because it appears from the evidence that McLean informed the company, when he sold them the last note, that the other notes were secured on the same property. It is, therefore, not necessary to consider whether the situation would be different if either party took without notice of the rights of the other. The most forcible argument made on behalf of the appellant is, that having indorsed the three notes generally to the bank, if McLean had retained the fourth note, he could not, as against the bank, urge a right to participate pro rata in the proceeds of the mortgage, and that, under the evidence, the electric company has no equity superior to that of McLean. This argument appeals to the writer as one having in principle much force, but in *Studebaker v. McCargur*, 20 Neb. 500, there was a general indorsement, and the court does not seem to have regarded that fact material. Moreover, the principle which would forbid McLean, had he retained the fourth note, from claiming the right to a pro rata distribution is based on the policy of courts of equity to avoid circuitry and multiplicity of actions (*South Omaha Nat. Bank v. Wright*, 45 Neb. 23), rather than on any contractual obligation. So that the position of the electric company as transferee of the fourth note is not the same as McLean's position would be had he retained it. The electric company was not surety or indorser on the other notes.

¶ It is argued that the rule requiring that such notes shall prorate may be varied by special agreement, but there is in this case no evidence of any such agreement. The fact that some of the notes were transferred before the others does not imply any agreement that the notes first transferred shall have priority. This feature existed in the cases we have cited. We see nothing in the case to take it out of the general rule.

Judgment affirmed.

CORPORATIONS—NOTICE TO OFFICER AS NOTICE TO CORPORATION.—Knowledge which comes to an officer of a corporation through his private transactions, and beyond the range of his official duties, is not notice to the corporation, although he is at the time managing agent of the corporation: *Kearney Bank v. Froman*, 129 Mo. 427; ante, p. 427, and note.

MORTGAGE—DEED ABSOLUTE, WHEN CONSIDERED AS.—A conveyance absolute in form will be adjudged to be a mortgage, when it is shown by evidence clear, certain, unequivocal, and trustworthy

that such instrument was executed, delivered, accepted, and intended by the parties to secure the payment of a debt: *Perot v. Cooper*, 17 Col. 80; 31 Am. St. Rep. 258, and note with the cases collected. See, also, the case of *Keithley v. Wood*, 151 Ill. 566; 42 Am. St. Rep. 265, and note.

MORTGAGES—ASSIGNMENT.—The indorsement of a note secured by a mortgage operates as an equitable assignment of the mortgage: *Connecticut etc. Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655; *Pardee v. Lindley*, 31 Ill. 174; 83 Am. Dec. 219, and note; *Herring v. Woodhull*, 29 Ill. 92; 81 Am. Dec. 296, and note. The mere assignment of the mortgage debt carries with it the mortgage as an incident and may be enforced by the assignee in his own name: *Lanier v. McIntosh*, 117 Mo. 508; 38 Am. St. Rep. 676, and note.

PERCIVAL v. STATE.

[45 NEBRASKA, 741.]

CONTEMPT BY NEWSPAPER PUBLICATION.—Any publication relating to a cause pending in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice, or reflecting on the tribunal or its proceedings, or on the parties, jurors, witnesses, or counsel, may be punished as a contempt.

CONTEMPT.—NEWSPAPER PUBLICATION is a contempt of court only when it has reference to a matter then pending in court, and is of a character tending to the injury of pending and subsequent proceedings upon such matter.

CONTEMPT BY NEWSPAPER PUBLICATION—CONCLUSIVENESS OF ANSWER.—If a newspaper publication alleged to be a contempt of court is indefinite in its meaning and application, and not libelous per se, and only becomes so and made to apply to the court by the use of innuendoes, and is fairly susceptible of an innocent meaning, so far as any reflection upon the court is concerned, and defendant answers under oath that he used it in a sense not libelous, and declares that he intended no imputation upon the court, either impugning the motives or integrity of the judge, or to embarrass the administration of justice, his answer must be taken as conclusive.

E. W. Simeral and E. R. Duffie, for the plaintiff in error.

A. S. Churchill, attorney general, and W. S. Summers, deputy attorney general, for the state.

742 HARRISON, J. In this case the plaintiff in error was proceeded against for contempt, resulting in his conviction and sentence. It appears that there were two trials or hearings, a judgment of conviction and sentence upon the first being set aside upon motion of plaintiff in error, and a new hearing awarded. It is stated that the affidavit or complaint—the basis of the first trial or hearing of the proceedings—differed from the one upon which there was a final hearing; but however this may be, the complaint which was presented here as containing the charge of which plaintiff in error was convicted is as follows:

“Comes now J. L. Kaley, county attorney in and for the county

of Douglas and state of Nebraska, and in the name of the state of Nebraska gives the court to understand and be informed, who, being sworn, on his oath says that Washington D. Percival, on or about the ninth day of March, 1894, in the county aforesaid, then and there wrongfully, unlawfully, and maliciously, for the purpose and with the intent of bringing the district court in and for the county of Douglas and state of Nebraska, and then and there being presided over by Judge C. R. Scott, one ⁷⁴³ of the judges of said district court, into disrepute and ridicule, and to cause the people to have a contempt for said court, and for the purpose of causing it to be believed that said court was corrupt and influenced by corrupt motives, and for the purpose of destroying the integrity, honor, and efficiency of said court in the administration of public justice, and for the purpose of vilifying and traducing said court, and to thwart the due administration of justice in said court, and with the intent willfully to obstruct the proceedings and hinder the due administration of justice in a suit then and there and therein pending before said court, to wit, the cause of the state of Nebraska v. T. T. Jardine, and then and there being undisposed of in said court, then and there wrote and published, and caused to be published, in the Omaha Evening Bee, being a daily newspaper published in the city of Omaha on said ninth day of March, 1894, and of general and extensive circulation, and being generally read in said city of Omaha and in the county of Douglas and fourth judicial district of the state of Nebraska, and throughout the state of Nebraska, in which said court presided over by said Judge C. R. Scott, then and there being the criminal section of the said district court, and was and is one of the courts of said judicial district, of and concerning said court the following false, scandalous, contemptuous, and defamatory matter, that is to say: 'Justice Without Equality—Sentences Adjusted to Fit the Men—One Party to a Crime Gets a Five Year Sentence in the Penitentiary, While Another Gets the Benefit of a Pull. Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. The same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary, if the pull is worked for all it is worth,' intending then and there and thereby wrongfully, unlawfully, and contemptuously to cause it to be believed ⁷⁴⁴ that said court presided over by said Judge C. R. Scott was corrupt and influenced by corrupt motives."

After some preliminary pleas were filed on behalf of plaintiff in error, and heard and disposed of by the court, and an affidavit in the nature of an answer, which was verified positively, was filed for the party charged, in which he denied that he wrote, or caused to be written or published, the following portion of the article quoted in the information, viz: "Justice Without Equality—Sentences Adjusted to Fit the Men—One Party to a Crime Gets a Five Year Sentence in the Penitentiary, While Another Gets the Benefit of a Pull," but admitted that he wrote the remainder of the article set forth in the information, which was as follows: "Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. The same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary, if the pull is worked for all it is worth," and it does not appear, and is not shown, that plaintiff in error was the author or caused to be published any more of the article alleged in the complaint than the portion the authorship of which he admitted in his answer. We then have here a charge of not direct, but constructive, contempt, alleged to have been committed by the writing and publication of such admitted portion of the article. It is contended by counsel that the portion of the article written or published, or cause to be published, by the plaintiff in error, did not constitute a contempt of court. In section 669 of the Code of Civil Procedure, under the head of "Contempt," it is provided: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of 4. Any willful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts." ⁷⁴⁵ In 2 Bishop's Criminal Law, 259, it is stated: "By the commonly accepted doctrine, any publication, whether by parties or strangers, relating to a cause in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice, or reflecting on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt." It has also been said that the power to punish for contempt "is inherent in courts of justice, necessary for self-protection, and an essential auxiliary to the pure administration of the law": *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 542. These are general rules, and we will now turn to some which, though general, are more specifically applicable to the facts and circumstances as developed in the case

at bar. The general rule is, that to constitute any publication a contempt, it must have reference to a matter then pending in court, and be of a character tending to the injury of pending proceedings upon it, and of the subsequent proceeding: Rapalje on Contempt, sec. 56; 2 Bishop's Criminal Law, sec. 262; Fishback v. State, 131 Ind. 304; State v. Sweetland, 3 S. Dak. 503. The plaintiff in error, in his answer, denied that he used the words in the portion of the article written by him, which is set forth in the complaint, with intention to cast upon either the court or its officers any imputation or charge of corruption or lack of integrity, and with intent to embarrass or impede the administration of justice. "If the article is per se libelous, making a direct charge against the court or jury, admitting of but one fair and reasonable construction, and requiring no innuendo to apply its meaning to the court, then it would be trifling with justice to say that the publisher could admit the publication and deny that he intended the plain and unmistakable meaning which the language used conveys; but when the language used in an article is not per se libelous, and only becomes so and made to apply to the court by the ⁷⁴⁸ use of innuendoes, and if fairly susceptible of an innocent meaning, so far as any reflection upon the court is concerned, and defendant answers, under oath, that he used it in a sense not libelous, and declares he intended no imputation upon the court, either impugning the motives or integrity of the judge or to embarrass the administration of justice, his answer must be taken as conclusive": Cheadle v. State, 110 Ind. 301; 59 Am. Rep. 199; Fishback v. State, 131 Ind. 304. We think the above rule a correct one. The language of the portion of the article proved or admitted by the plaintiff in error to be his production (we will quote it again), "Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. The same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary, if the pull is worked for all it is worth," cannot be said, upon its face and without an innuendo, to apply or refer to the court proper or its officers, or to jurors or witnesses, or to one more than another, or to be libelous per se, or that it clearly charges, as is stated in the complaint, that the court was corrupt and influenced by corrupt motives, or to so charge with reference to any particular person or persons, or to anyone more than another. It cannot be said, upon its face, to refer to any case pending at the time it was written and published, or to any designated case.

In its terms, it deals with some past transaction or proceedings. The phrase "possessed of a pull" is, to speak strictly, without an intelligible meaning, and is, in any event, so doubtful and uncertain that it cannot be applied as imputing that the court was corrupt as is claimed in the complaint, with any greater certainty than it may be said to refer to some other person or persons or to actions or motives erroneous and improper, but not corrupt. The portion of the article admitted and proved to be the work of plaintiff in error, and the proof made, were insufficient to support a charge ⁷⁴⁷ and conviction of contempt and sentence therefor: *State v. Sweetland*, 3 S. Dak. 503. We desire to state that we are only herein passing upon the portion of the article admitted or proved in the present case to have been penned by the plaintiff in error, and that no other parts of the article with which this seems to have been connected have been considered, nor has the probable effect or meaning of the portion herein involved been contemplated when read in connection and as a part of the whole article.

It follows from the views herein expressed that the judgment of the district court must be reversed and plaintiff in error discharged.

Contempts of Court by Libelous Newspaper Publications.

The principal case presents a frequently recurring question of very great importance, one to which the attention of the public is invited more frequently than that of the courts, and the discussion of which, especially before the public, is too often characterized by ill-feeling. We refer to attempts to fix the boundaries beyond which the public press may not go in publications respecting judges and judicial proceedings, and, on the other hand, beyond which the judges and courts may not go in restraining the freedom of the press, and in punishing it for improper interference with these proceedings, or for bringing them into unmerited contempt. This topic, however, has received such direct and incidental consideration in this series of reports that it will not here be necessary to do more than to restate the conclusions announced in the previous notes, and to refer to decisions made since they were written: Note to *Matter of Sturoc*, 97 Am. Dec. 629-632, on the power of courts to punish contempts committed by newspaper publications: Note to *State v. Galloway*, 98 Am. Dec. 418, 419, on the power of courts to prevent the publication of the evidence and proceedings in pending causes; and that part of the note to *In re Philbrook*, 45 Am. St. Rep. 83-86, on the disbarment of attorneys for contempts and calumnies of courts and judges.

The principles controlling the subject here under consideration are comparatively free from controversy, but, as is usual where conflicting interests and purposes are involved, the difficulty is in the application of substantially conceded principles to varied controversies.

That the administration of justice should be pure and impartial, no one will have the temerity to deny; and it is equally beyond dispute, that, to be pure, it must be kept clear, not only of all mere monetary considerations, but, further, it must be preserved from improper influences, whether of a financial character or not. It is of the essence of all judicial proceedings that no one shall be condemned unheard; that

every one shall have a fair and full opportunity to adduce witnesses, both to prove his cause or defense, and to meet the evidence which may be offered by his adversary; and that he has the right to have such cause or defense submitted to the tribunal having jurisdiction over it, upon such evidence and the evidence of his adversary, supported by the arguments of their respective counsel; and that no person shall, out of court, seek to influence the decision by means to which it is improper for the tribunal to which it has been or is to be submitted to yield in pronouncing judgment. Further, it is improper, and a contempt of court, for any person to seek to pollute the administration of justice in the courts. It is also conceded that the efficiency of the courts and the stability of government, at least among a free people, are dependent upon their confidence in the integrity of the courts and their ability and willingness to deal impartially with the questions committed to their consideration; and that to impute to the courts, or the judges presiding over them, corrupt motives in the discharge of their judicial functions, in cases still pending before them, is a contempt of court, and may be punished as such.

While there is still controversy upon the subject, we think reason and the great weight of authority concur in affirming that, though it may be competent for the legislature to regulate proceedings in cases where contempts are alleged to have been committed, it cannot thereby, nor otherwise, take from courts of general jurisdiction their inherent power to command the respect due to them and their decisions; and, therefore, the authority to punish for contempt need not be founded on any statute, nor is it subject to statutory destruction. In other words, when the constitution of the state creates courts of general jurisdiction, it thereby necessarily invests them with the powers requisite for its exercise, included within which is the power to compel orderly and respectful proceedings and demeanor on the part of all persons coming into the presence of the court, obedience to the judgments and mandates of the court, and the refraining from all acts and words which may tend to pollute the administration of justice, or which may discredit the courts and judges by imputing to them dishonorable motives in the discharge of their duties. As to contempts committed in the presence of the courts, and which must there embarrass their proceedings, we believe there is at present no contention that the courts have not inherent power to vindicate themselves, and to call the offender to account by summary proceedings to punish him for contempt. Otherwise, it is clear that the obstruction interposed might be such as to preclude the possibility of proceeding at all in the modes necessary and appropriate to judicial tribunals. As to contempts not committed in the presence of the court, and which are sometimes called constructive contempts, the claim has been made that there is no inherent power in the courts to consider or punish them, and statutes have sometimes been enacted seeking to fetter or destroy such power. There is not, in our judgment, any essential difference between what are thus denominated constructive contempts and those contempts committed in the presence of the court, and sometimes called direct contempts, in respect to the inherent power of the courts to protect themselves and the administration of justice by the punishment of offenders; and the legislature has as little authority to destroy, or substantially impair, the power in one case as in the other: *State v. Morrill*, 16 Ark. 388; *State v. Frew*, 24 W. Va. 416; 49 Am. Rep. 257; *In re Shortridge*, 99 Cal. 526; 37 Am. St. Rep. 78; *Cheadle v. State*, 110 Ind. 301; 59 Am. Rep. 199; *Cooper v. People*, 13 Col. 356; *State v. Judge*, 45 La. Ann. 1250; 40 Am. St. Rep. 282; *In re Cheeseman*, 49 N. J. L. 137; 60 Am. Rep. 596; *Middlebrook v. State*, 43 Conn. 257; 21 Am. Rep. 650; *Watson v. Williams*, 36 Miss. 331; contra, *In re Robinson*, 117 N. C. 533; *In re McKnight*, 11 Mont. 126; 28 Am. St. Rep. 451.

Contempts of the class here to be considered, namely, those committed by newspapers and similar publications, are constructive, rather than direct. Persons accused of committing them will always main-

tain that they were acting without malice, in the interests of the public, exercising the freedom, which is granted the press in this country, to comment upon public affairs and public officers; that the judges are, no less than other public officials, subject to public criticism; that what has been done is not in any proper sense a contempt of court, and, if a contempt at all, is of the class styled constructive, which the courts have not inherent power to punish; and that if there be any remedy at all, it must be by a private action or a criminal prosecution for libel. There is, in nearly every case, much reason for difference of opinion whether the act complained of was a contempt of court, or a legitimate exercise of the right of the freedom of speech of the press, but if it be conceded that it was a contempt of the court, then we think the legislature cannot substantially impair the power of the court to punish it, and, as incident to the exercise of that power, to institute a summary inquiry for the purpose of ascertaining whether a contempt has been committed. To hold otherwise would be to subject the courts to the newspapers, and to permit them to determine by what means, outside of the courtroom, they might proceed, either to pollute the administration of justice, or to bring it into unmerited contempt.

For the purposes of this note, we shall divide alleged contempts of court by newspapers and similar publications into two classes: 1. Those in which it is claimed that the object of the publication was to affect the decision of a pending cause; and 2. Those which have for their apparent purpose the bringing of courts, or the judges and other officers constituting an essential part thereof, into discredit.

As to cases of the first class, there is no doubt of the rule controlling them, nor is there much difficulty in its application. If the publication was intended to have, or must necessarily have, the effect of preventing litigants, or any of them, from having a fair trial of their cause upon its merits before the tribunal having jurisdiction of it, then the person responsible for such publication has been guilty of a contempt of court. This he prevents, or at least attempts to prevent, when he seeks by such publication to bias the public mind upon the merits of a pending cause by attempts to raise prejudices against his adversary in the minds of those who must ultimately determine between them, and "for this purpose represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice," for he thereby "willfully seeks to corrupt the source, and to dishonor the administration, of justice": *Respublica v. Oswald*, 1 Dall. 319; 1 Am. Dec. 246; *In re Cheeseman*, 49 N. J. L. 137; 60 Am. Rep. 596; *Respublica v. Passmore*, 3 Yeates, 441; 2 Am. Dec. 388; *People v. Freer*, 1 Caines, 518; *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 528; or denounces a pending criminal prosecution "as being instituted and forwarded by litigious and meddlesome persons, and as to leading to the squandering of hard-earned wages of the taxpayers by bigots and demagogues": *Matter of Sturoc*, 48 N. H. 428; 97 Am. Dec. 626; or during the trial of a cause, and after witnesses for the plaintiff had been examined, publishes an account of the proceedings, with a criticism upon the witnesses, such as, being read by the jurors, would have biased them in their decision: *State v. Judge etc. of Court*, 45 La. Ann. 1250; 40 Am. St. Rep. 282; or publishes anything in reference to the parties to, or subject matter of, a pending litigation, which tends to excite a prejudice against them or it: *Tichborne v. Tichborne*, 39 L. J. Ch. 398; 22 L. T. 55; 18 Week. Rep. 621; or, during the pendency of an election contest, publishes a series of articles calculated to interfere with the due course of justice, by prejudicing the public mind against the contestant, or preventing witnesses from affording him their evidence: *In re Macartney v. Corry*, 7 I. R. C. L. 242; or, after an indictment has been found and a day fixed for the trial, addresses public meetings, and there alleges that the accused is innocent, that there is a conspiracy against him, and that he cannot have a fair trial: *Regina v. Castro*, L. R. 9 Q. B. 219; 28 L. T. 222; 12 Cox C. C. 371; or publishes, respecting affidavits which have been filed, but not yet used in a cause, an article attributing false-

hoods to the persons who made them: *Felkin v. Herbert*, 10 Jur., N.S., 62; 9 L. T. 635; 12 Week. Rep. 332; or publishes a statement respecting the merits of a cause, tending to discredit one of the parties, and offering a reward for the production of evidence, though as to the offer of such reward, the more recent decisions incline not to regard it as an attempt to suborn witness, unless it appears to be made in bad faith: *Pool v. Sacheverel*, 1 P. Wms. 675; *Butler v. Butler*, L. R. 13 P. D. 73; *Brodribb v. Brodribb*, L. R. 11 P. D. 66; *Daw v. Eley*, L. R. 7 Eq. 49; or by attacking in print a party and his witnesses as having been guilty of perjury: *Littler v. Thompson*, 2 Beav. 129; and, generally, every publication, of whatsoever nature, the object of which is to create a prejudice against a litigant, and thereby embarrass him in the prosecution of his cause or defense by generating, in the mind of the court or jury by which it must be determined, such a bias against him or it that he probably cannot have a fair trial: *Daw v. Eley*, L. R. 7 Eq. 49; *Tichborne v. Mostyn*, L. R. 7 Eq. 55, note; *In re Cheltenham etc. Co.*, L. R. 8 Eq. 580; *In re Crown Bank*, 44 Ch. Div. 649. A publication need not, to constitute an interference with justice, and therefore a contempt of court, be addressed to a court or judge. It may refer to any person who, for the time being, is an essential part of the court, or who is otherwise so situated that the influences brought to bear upon him by the objectionable publication, if effective, would have amounted to an interference with, or a pollution of, the course of justice. Thus, the grand jury is an essential part of the court in matters of criminal prosecution; and the writing to them of a letter reflecting, by severe and opprobrious language, upon the conduct and integrity of the jurors in connection with charges which were the subject of investigation before them, and stating that if they found an indictment thereon, the community would conclude that they had been bribed to do so, is punishable as a contempt of court. In so deciding, the supreme court of California said: "The letter was neither written nor sent for the purpose of informing the grand jury of evidence which would explain away the charges under investigation against the petitioner's client. It was aimless for any purpose, except to exasperate the jurors by the aspersions upon their official conduct which it contained, or to deter them from performing their duties by the threats of a public clamor which it expressed, or to create a distrust and want of confidence in any action which might be taken as the result of their investigation, and thus to embarrass the court itself in the administration of justice. That such a communication to a jury sitting in, or in connection with, a court, of which it is a component part, and while engaged in the exercise of its functions, is a punishable contempt of court does not admit of doubt. 'Any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning the merits, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt': *Bishop's Criminal Law*, sec. 216. It would be strange if, under a government of law, it were otherwise": *In re Tyler*, 64 Cal. 434.

With respect to the second class of publications, namely, those which expose courts and judicial officers to contempt without attempting to pollute or otherwise affect the administration of justice, it is difficult to formulate a rule necessarily supported by the decisions of the courts, for the reason that, in nearly every instance in which publications punished as contempts of court have had, as their chief or only object, the exposing of a judge or court to unmerited calumny in respect to his or its judicial action, it has been possible to assert that they might have affected, and might have been intended to affect, a case still pending. There are, indeed, many decisions in which such publications have been adjudged to be contempts; though, so far as we can see, they could not have influenced, nor have been intended to influence, the decision of a cause, but rather to give expression to personal ill-will, and to deprive

judges and courts of the public confidence and respect; but in every, or nearly every, instance, attention has, nevertheless, been called to the fact that the matter complained of was published during the progress of a cause, pending the decision of which, or of some matter arising therein, the adverse comments have been made, though, in some of them, the particular matter so commented upon had been finally decided, so that such comments could not possibly be construed as attempts, either to influence the criticised decision, or to cause it to be reconsidered.

In several states statutes have been enacted declaring it to be a contempt of court to publish a false or grossly inaccurate report of its proceedings. In a state having such a statute, a newspaper, commenting upon the appointment, by a judge named Clute, of certain lawyers to defend persons accused of violating election laws, these lawyers having before then been prominent in prosecuting violations of that class, stated that the judge was aware of that fact, and that, "in the light of these facts, the low-down character of the judicial trick to which Jacob H. Clute descended may be realized. He availed himself of his power as a county judge to place these two worthy lawyers, who have fought to prevent suffrage stealing in Albany, in the dilemma of defending election criminals, or else subjecting themselves to a fine of five hundred dollars, and imprisonment for thirty days for contempt of court." The article also further denounced the judge in unmeasured terms, and alluded to his judicial acts in other cases. The court of appeals, in determining that the publication constituted a contempt, under the statute of the state, said: "The comments in the article published, reflecting upon the conduct and character of the presiding judge, were of a most extraordinary nature. It is to be regretted that the editors and publishers of an influential journal should so far violate their privilege and misconceive their duty to the public. The publication of the articles was exceedingly harmful. They tended to bring into disrepute the administration of the law, and to destroy the confidence of the public in, and its respect for, the proceedings of our courts. If the judge is guilty of the charges, complaint should be made to the proper officers, and proceedings instituted for his removal. If he is not guilty, the dignity of the court should be preserved by the prompt punishment of the offenders": *People v. Court of Sessions*, 147 N. Y. 290.

In West Virginia, a newspaper publication charged three of the judges of the supreme court with having attended a political caucus, and there advised certain action to be taken, and having promised that when acting as judges of that court they would sustain such action, and that, in compliance with such pledge, they were about to decide a cause before them, not according to their convictions, but because of such pledge and as convenience and political desires might dictate. In determining to punish this publication as a contempt, the court said: "Is the publication complained of here a contempt to this court? It seems to us that the books do not furnish a clearer case of contempt. It is a contempt, because it charges three of the judges of this court, acting in their judicial capacity, with an offense, which, if true, is just ground of impeachment—with an offense calculated to degrade the court and destroy all confidence of the people therein. If to charge three of the judges of this court with having attended a political caucus and advised a certain action by the same, coupled with the promise, that as a court, they would sustain the action of the caucus, and then, in pursuance of that pledge, made more than a year ago, the same judges, as a court, were about to decide the case then before them as the caucus desired, is not a contempt of the court, then it seems to us that nothing would constitute a contempt. If to charge a court or a majority of its members with having prostituted their high and sacred trust to base political purposes is not a contempt, then we may truly say that such a thing does not exist. The article on its face shows, moreover, that it was intended to influence the decision of the court in the cause, to which

reference is therein made, and which was then pending, or to prevent the court from deciding it at the present term": *State v. Frew*, 24 W. Va. 416; 49 Am. Rep. 257.

A writ of habeas corpus having been issued by the supreme court of a state, alleging that the bail required by the examining magistrate of a person in jail on a charge of murder was excessive, that court, upon testimony produced at the return of the writ, ordered the prisoner to be admitted to bail in the sum of five thousand dollars. About a month afterward, and while the court was still in session, a newspaper printed an article reflecting upon its action in thus granting bail, and indicating that it was attributable to extraneous influences, probably bribery. When the attention of the court was called to the matter, it made an order directing that the publisher be summoned to appear to show cause why proceedings should not be had against him as for a criminal contempt. In response to this summons, he assailed the jurisdiction of the court, and contended that the publication was not embraced within the statute regulating the punishment of contempts. It was conceded that the publication complained of did not fall within any of the provisions of the state statute designating contempts of court, but the court held that the power to punish was inherent, and therefore not subject to legislative destruction. It was also claimed "that the publication of a libel upon the official action of a court, being an outdoor affair, was not, by the common law, the subject of contempt; and, if it were, it was only so where the publication was made in reference to a cause pending in court; and that inasmuch as the publication in question was made after the case had been determined by the court, and was therefore not pending, it does not fall within the definition of common-law contempts." The court, in determining that a punishable offense had been committed, declared, in effect, that the power to punish for contempt extended to insults offered, and indignities suffered, by judges in consequence of their judicial acts. After referring to several English and some American cases, the court further said: "The cases above cited (and many more might be cited, if deemed at all necessary) abundantly show that, by the common law, courts possessed the power to punish as for contempt libelous publications, of the character of the one under consideration, upon their proceedings, pending or past, upon the ground that they tended to degrade tribunals, destroy that public confidence and respect for their judgments and decrees so essential to the good order and well-being of society, and must effectually obstruct the free course of justice." In response to the suggestion that, by the bill of rights contained in the state constitution, the press had been made free, and at liberty to comment upon public affairs, the court answered:

"Any citizen has the right to publish the proceedings and decisions of this court, and, if he deem it necessary for the public good, to comment upon them freely, discuss their correctness, the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important public trusts reposed in them, but he has no right to attempt, by defamatory publications, to degrade the tribunal, destroy public confidence in it, and dispose the community to disregard and set at naught its orders, judgments, and decrees. Such publications are an abuse of the liberty of the press, and tend to sap the very foundation of good order and well-being in society, by obstructing the course of justice. If a judge is really corrupt, and unworthy of the station which he holds, the constitution has provided an ample remedy by impeachment or address, where he can meet his accuser face to face, and his conduct may undergo a full investigation. The liberty of the press is one thing, and licentious scandal is another. The constitution guarantees to every man the right to acquire and hold property, by all lawful means, but furnishes no justification to a man to rob his neighbor of his lands or goods. . . . If an ignorant or impolite man stalks into a courthouse with his

hat on, or makes a noise about the door, or disobeys process, all agree that he may be punished for contempt; but if a man has an important case pending in court, and, willing to resort to desperate measures to succeed, publishes on the eve of the trial a libel, alleging that the judge has been bribed to charge the jury against him, and that all witnesses who are to appear on behalf of the opposing party have been corrupted, and are unworthy of credit, it is no contempt, and the judge must labor under the embarrassment of sitting in the case, under such circumstances, with his mouth closed! Or if a judgment is rendered against a man, as soon as the judge leaves the bench, he is met at the door, insulted or assaulted by the party, in consequence of his decision, and then a publication is made in a newspaper charging him with corruption in rendering the judgment, and calling upon the community to disregard and resist its execution, and yet this is no contempt! These cases are put by way of illustration; they may be extreme, and yet they may occur; and when we are called upon to declare, in effect, that the courts have no power to punish any act as a contempt which is not enumerated in the statute, as we now are by defendant's plea, it is well to anticipate the results that may flow from such a decision": *State v. Morrill*, 16 Ark. 388.

A person who had been indicted and tried on a criminal charge, the jury having disagreed, published in his newspaper an article intended to cast discredit upon the grand jury that indicted him, upon the sheriff who summoned the jury, and upon the judge who presided at his trial, and who, in the regular discharge of his official duties, would preside when the cause should be again tried. The publisher, having been adjudged by the court to be guilty of contempt, prosecuted an appeal, insisting that although his offense would be regarded as a contempt in England, yet the English views upon the subject had their origin subsequent to the American Revolution, and, therefore, were not to be considered as indicating the common law of this country. His position in this respect was, however, shown to be false by a reference to many decisions in the mother country. He next contended, that, though the power to punish his contempt might have existed and been recognized in England, yet such power did not pass to the courts of New Jersey. To this the court answered: "That so far as our courts are modeled after English courts of common law, a presumption arises that they possess all the powers which their prototype lawfully exercised, and the burden of establishing the contrary rests upon him who asserts it." This burden was endeavored to be assumed by the counsel maintaining that the power to punish for contempt, as claimed in the case, "is contrary to the spirit of our institutions." The court answered: "The reason for deeming it contrary to the spirit of our institutions that our courts shall have the same power as their predecessors to defend themselves against abusive words, is not apparent. Only two arguments for withdrawing from them this authority can be imagined, one that abusive words have ceased to be regarded as a means of injury; the other, that such power could no longer be safely intrusted to the courts. But neither argument is well founded; for, by adopting the common law touching slander and libel, our forefathers unequivocally asserted their opinion that injury would still flow from unbridled tongues and pens, and, by conceding to the courts the power of punishing contempts generally, they recognized the trustworthiness of the judiciary in vindicating, by summary process, their own authority and dignity. Why, then, should this single species of injury be taken from the category in which it has always stood? The importance of the 'liberty of the press' is urged upon us. We do not underestimate it; but, after all, the liberty of the press is only the liberty which every man has to utter his sentiments, and can be enjoyed only in subjection to that precept both of law and morals, *Sic utere tuo, ut alienum non lædas*. In a government where order is secured, not so much by force as by the respect which citizens entertain for the law and those charged with its administration, nothing which tends to preserve that respect from forfeiture,

on the one hand, and defraction, on the other, can be hostile to the commonwealth": In re Cheeveman, 49 N. J. L. 137; 60 Am. Rep. 598. See, also, In re Hawke, 28 N. B. 391; In re Baird, 27 N. B. 99.

A publication having been signed by a large number of the members of the bar, stating that they had witnessed public demonstration of political partisanship on the part of the judges of the supreme court with regret, and alarm for the protection of the future administration of the laws of the land, and that they had seen the judges of that court depart from that becoming propriety so indispensable to secure the respect of the people, and, turning aside the ermine, rush into the mad contest of politics, under the excitement of drums and flags, such publication was by the court declared to be a contempt, but a rule to punish it was discharged, upon a disavowal by the offenders of any intention to commit a contempt of court: Matter of Moore, 63 N. C. 397.

In Colorado, certain proceedings upon habeas corpus on behalf of John Wyatt were made the subject of newspaper comment. The petition upon which the writ issued was spoken of as a "gauzy fiction," the judge who issued it was referred to as a "tool," and "charged with stepping outside of legal precedents" to keep "precious Johnny out of jail for two or three days." In various articles, the proceedings were referred to as a "judicial outrage," and the judge threatened with political punishment, the language used upon this subject being: "Judge Thomas B. Stuart, of the judicial court, dug his official grave both wide and deep, when he issued a writ of habeas corpus on Thursday night for the liberation of Deputy Secretary of State Wyatt from the jail of Arapahoe county. Nor can he hope to escape the suspicion that the supposed political pull of the gang, of which Deputy Wyatt is such a prominent member, had some weight in procuring this writ." The newspaper, by this publication, also demanded that another judge "take summary action to the fullest extent of his jurisdiction to send Mr. Wyatt back to jail." The newspaper, apparently in response to a suggestion that it might be guilty of contempt, stated in another article: "If the Republican was guilty of contempt yesterday morning, it is still more in contempt this morning, for we not only do not take back a word we have already said in this matter, but we repeat it with emphasis. Judge Stuart committed a gross outrage when he let Wyatt out on bail, and he had neither authority nor excuse of a credible kind for interfering in the case at all." A cartoon was also published. The judgment in this case, while it punished a publication which related to a past action of a court or judge, was grounded, partially at least, upon the fact that the case was still pending; that the publications themselves tended to "prejudice the public as to the merits of a cause then pending and undisposed of; to degrade the court and judge before whom the same was pending; and to impede, embarrass, and defeat the administration of justice in reference thereto."

"In these articles the petitioner Wyatt is charged with perjury; grave reflections are cast upon the court, and upon the judge thereof; and the whole tendency of the language used was to inflame the popular mind against both the petitioner and the judge, for the evident purpose of coercing the latter in sending the former back to jail." The court further said: "Parties have a constitutional right to have their causes tried fairly in court by an impartial tribunal, uninfluenced by newspaper dictation or popular clamor. What would become of this right if the press may use language in reference to a pending cause calculated to intimidate, or unduly influence and control, judicial action? Days, and sometimes weeks, are spent in the endeavor to secure an impartial jury for the trial of a case; and, when selected, it is incumbent upon the court to exercise the utmost care in excluding evidence of matters foreign to the issues involved; so that the minds of the jurors may not, perchance, be unduly biased or prejudiced in reference either to the litigants or to the matters upon trial. But if an editor or litigant, or those in sympathy with him, should be permitted, through the medium of the press, by promises or threats, invective, sarcasm, or denuncia-

tion, to influence the result of the trial, all the care taken in the selection of the jury, as well as the precautions taken to confine their attention at the trial solely to the issues involved, will have been expended in vain. We could not for a moment sanction any contraction of the freedom of the press. Universal experience has shown that such freedom is necessary to the perpetuation of our system of government in its integrity; but this freedom does not license unrestrained scandal. By a subsequent clause of the same sentence of our state constitution in which the liberty is guaranteed, the responsibility for its abuse is fixed. With us the judiciary is elective, and every citizen may fully and freely discuss the fitness or unfitness of all candidates for the position to which they aspire; criticise freely all decisions rendered, and, by legitimate argument, establish their soundness or unsoundness; comment on the fidelity or infidelity with which judicial officers discharge their duties; but the right to attempt, by wanton defamation, to prejudice the rights of litigants in a pending cause, degrade the tribunal, and impede, embarrass, or corrupt that due administration of justice which is essential to good government, cannot be sanctioned": *Cooper v. People*, 13 Col. 3. 7.

In Iowa, in several cases, the position has been distinctly taken that any publication respecting the decision of a cause, or the conduct of the judge in the discharge of his official duties, no matter of how libelous a character, cannot constitute a contempt of court, although the cases respecting which the adverse comment was made were still pending upon appeal: *Dunham v. State*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207. So, in Indiana, the rule upon the subject is thus stated: "It follows, therefore, that comments, however stringent, which have relation to proceedings which are past and ended are not in contempt of the authority of the court to which reference is made. Such comments may constitute a libel upon the judge or some other officer of the court, but cannot be treated as a contempt of its authority": *Cheadle v. State*, 110 Ind. 301; 59 Am. Rep. 199.

In Illinois, persons were proceeded against as for a contempt of court in publishing certain articles censuring the action of the grand jury, and questioning its integrity as a body, but it was not claimed that, when these publications were made, the charges were still pending before the grand jury for its action, and therefore the question was presented, whether, considering the grand jury as a part of the court, an attack upon its action, or that of any of its members, could be punished as a contempt of court, when such attack could not have been for the purpose of embarrassing or otherwise influencing its action. The court held that the constitutional guaranty in favor of freedom of speech and of the press was applicable to the proceeding before it, and declared that it is not admissible "that a publication, however libelous, not directly calculated to hinder, obstruct, or delay courts in the exercise of their proper functions, shall be treated and punished summarily as a contempt of court": *Storey v. People*, 79 Ill. 45; 22 Am. Rep. 158.

A case which may, perhaps, be conceded to sustain punishment for contempt in making libelous comments upon past transactions, though it did not involve any newspaper or other publication, is *In re Pryor*, 18 Kan. 73; 26 Am. Rep. 747. In that case, it was shown that a firm of attorneys, on receiving information that the judge had overruled their motion to dissolve certain injunctions, wrote him a letter stating they hardly believed that the information was true, "for it is directly contrary to every principle of law governing injunctions, and everybody knows it." They also stated in this letter that, if their motion had been overruled, they wished to reserve exceptions, "for it is our desire that no such decisions or orders shall stand unreversed in any court we practice in." This letter was construed as charging the judge with having decided contrary to what he knew the law to be, and, therefore, as constituting a contempt of court. There is nothing in the opinion of the court indicating that the attorneys, in writing this letter, sought to affect the decision of their cause. On the contrary, such opinion pro-

ceeds upon the theory that the object of the writers was to be insulting to the judge, and hence it may fairly be deemed to support the view that an insult to a judge, because of his judicial acts, may be punished as a contempt of court, though it did not take place in open court, and was not intended to affect subsequent proceedings in the cause. Various other cases may be cited in which insulting remarks in relation to judicial transactions which had already taken place were treated as contempts, but, in each of them, the cause was still pending, and it was possible to place the decision punishing the contempt on the ground that the accused might, by his action, have designed to improperly influence the further proceedings in the cause. Such a case was *Myers v. State*, 46 Ohio St. 473; 15 Am. St. Rep. 639. The plaintiff in error, having been jointly indicted with one Montgomery, published an article charging that the grand jury which found the indictment had been called by the judge of the court for a special partisan purpose, and had never been honestly drawn from the box; that the judge and other officers of the court had packed the jury, and that the indictment had been procured "by rascally and infamous methods." Notwithstanding a disclaimer on the part of the accused of any intention to commit a contempt, he was adjudged guilty and punished, the court on appeal saying: "The article was a libel upon the presiding judge, but that alone did not form the basis of the information. The intention of the publication was to insult and intimidate the judge, degrade the court, destroy its power and influence, and thus to bring it into contempt; to inflame the prejudices of the people against it; to lead them to believe that the trial then being conducted was a farce and an outrage, which had its foundation in fraud and wrong on the part of the judge and other officers of the court, and, if communicated to the jury, to prejudice their minds, and thus prevent a fair and impartial trial. Besides, the tendency was, when read by the judge, to produce irritation, and, to a greater or less extent, render him less capable of exercising a clear and impartial judgment. It therefore tended directly to obstruct the administration of justice in reference to the case on trial, and its publication was a contempt of court. The fact that, before its publication, a professional opinion was given that the publication would not be a contempt, does not change the essential character of the defamatory article, nor relieve the respondent of responsibility for its origin and dissemination. Neither was he justified in resorting to such means to right any real or imaginary wrong to himself in respect to the finding of the indictment." In another case, it appeared that after a demurrer had been sustained in an action, and leave had been given to amend the complaint, but before the time for such amendment had expired, an article was published in a newspaper headed "A Criminal Judge," and charging such judge "with deliberately lying about the law, deliberate and intentional falsification in his official capacity, and deliberate denial of justice," with being "not merely a fool, but an impudent rascal, and criminal on the bench," and stating that "he ought to be impeached and removed from office, disfranchised, indicted, and punished by a fine and imprisonment, and made a convict of." By the same article, the judge was challenged to prosecute the publisher on a charge of criminal libel. He was adjudged guilty of contempt of court, on the ground that "the publication was made at such a time as to affect, or have a tendency to affect, a proceeding then pending in court." As to the claim that the right to make the publication was assured by the constitutional provision guaranteeing liberty of the press, the court said: "The liberty of the press to fairly criticise the official conduct of a judge or the decisions or proceedings of the courts, and to expose and bring to light any wrongful, corrupt, or improper act of a judicial officer, is one that should be carefully preserved and protected by the courts. If a public supervision and censure, through the press or otherwise, is necessary to suppress corruption, and keep the channels of justice pure and untainted, the right to exercise such supervision, and to censure, and expose wrongdoing, should be, and must

be, upheld by the courts. But the publisher of a newspaper who assumes to criticise or censure a public officer or the proceedings of a court must know whereof he speaks. If he censures unjustly or charges falsely, he must be held strictly accountable. While his right of free speech is protected, his abuse of it must be punished. The great trouble with the freedom of the press at the present day, so far as it affects the courts, is, that it is used indiscriminately in many cases, not with the laudable purpose of correcting abuses and exposing wrongdoing, but to gratify ill-will and passion, or pander to the passions or prejudices of others. This tendency should be severely condemned and punished, not only for the protection of the courts and the preservation of a pure and independent judiciary, but as a means of upholding the liberty of the press in its true sense. The publication complained of here was a most flagrant abuse of the liberty of the press, and was justly punished as such": *Ex parte Barry*, 85 Cal. 603; 20 Am. St. Rep. 248.

The supreme court of Montana decided certain causes in which the state was a party, and announced its opinions therein. Afterward, but before remittitur issued, and, therefore, while the court retained jurisdiction over the causes, the attention of the public was called to the decisions in a newspaper of general circulation, in which it was asserted that the supreme court had been the first "to throw down the bars, and deal out injustice to the people of Ravilla county," and that "the dirty deal is made more obnoxious through the action of the governor in his reasons for granting pardon." The matter thus published was held to be punishable, under the statute declaring a false and grossly inaccurate report of legal proceedings to be a contempt of court: *State v. Faulds*, 17 Mont. 140, 143. The subject of contempts has been given very thorough consideration by the supreme court of New Mexico, and the conclusion reached that the power to punish them is inherent in all courts of general jurisdiction, and is not destroyed by the concession made in this country to the liberty of the press, and, therefore, that an article reflecting upon the judges of the court in respect to certain disbarment proceedings, by intimating that such proceedings were the result of personal and partisan ill-will on the part of the judges, was punishable as a contempt of court: *In re Hughes* (N. Mex.), 43 Pac. Rep. 692.

In the principal case, while the question as to contempts in referring to decisions in cases which had terminated before the reference was made was not necessarily involved, the court said: "The general rule is, that to constitute any publication a contempt, it must have reference to a matter then pending in court, and be of a character tending to the injury of pending proceedings upon it, and of the subsequent proceeding." The same publication which was the subject of the proceedings in the principal case was again brought before the supreme court of Nebraska in *Rosewater v. State*, decided in March, 1896, and the principles stated in the former decision were reaffirmed, and the proceedings dismissed, upon the ground that the accused had disavowed any intention to commit contempt or to reflect upon the court.

In the case of *State v. Sweetland*, 3 S. Dak. 503, the affidavit on which the proceedings were based was made by the county judge. In it he stated that on the fourteenth, fifteenth, and sixteenth days of January, 1892, the county court was in session, and a criminal cause was pending therein and was on trial (giving the name of the cause and of the charge involved therein), that Sweetland was the editor and publisher of a newspaper in the same county, and that an issue of such paper was published on January 15, 1892, or about that day, containing the following: "It was anarchy in the extreme when County Judge Hughes, in almost total disregard of the law and all rules of practice, in the Butts case, made the jurisprudence of the county of Hand look red with shame by his dishonest and fulsome rulings, and it was no less anarchistic that the little big lawyer from Beadle always advised it, and whose every 'Simon says thumbs up' by him was announced. One of the crowning acts of tyranny on the part of Judge Hughes was that of

fining Counsellor Pusey ten dollars for contempt of court, and shows the desperation to which the combine was driven to protect Lane in his regime of tyranny and outlawry. The Butts quarantine trial came for hearing before self-declared, self-demonstrated, unbiased (?) County Judge Hughes on last Tuesday, dragging heavily through three days and a night. It was the most disgusting farce ever perpetrated in the county." This affidavit was adjudged to be insufficient to sustain the conviction of the accused, on the ground that it did not appear therefrom that the article complained of was published during the pendency of the criminal proceedings referred to, "or was calculated to influence, intimidate, or embarrass the court" in such trial, or was calculated to prevent a full and impartial trial of the cause. The court further added: "If the judge was unjustly assailed by the article in question, he had the same, and only the same, remedies for redress of the wrong which belong to all other citizens. After the conclusion of a trial, the right of the press, without fear of punishment by contempt proceedings, in the interest of the public good, to challenge the conduct of the judge, parties, jurors, or witnesses, and to arraign them at the bar of public opinion in connection with causes that have fully terminated, cannot be denied by a court in any other manner than by ordinary proceedings in courts of justice. It would be a perversion of the salutary doctrines governing the proceedings of courts and their power to punish for contempts, to permit a judge to summon before him and punish by fine and imprisonment one who challenges his learning, integrity, or impartiality, as a judge in a public newspaper, except when the interests of the state demand it, to vindicate the independence and integrity of the courts, and to protect them from publications directly calculated to embarrass, impede, intimidate, or influence them in the due administration of justice in proceedings before them." This cause necessarily called for the determination of the question whether the publication of an article, though founded upon judicial action, and commenting thereon and upon the character of the judge in respect to the discharge of the functions of his office, in terms which were clearly intended to be insulting, can be punished as a contempt of court, and resulted in a well-considered opinion denying the existence of that power. The question is one of very great difficulty, and its solution may, on the one hand, unduly curtail the liberty of the press, and, on the other, impair the dignity, usefulness, and independence of the judiciary. To say of a judge that one or all of his decisions last year were rendered from mercenary, malicious, or partisan considerations, does not differ substantially, in effect, from saying that the decisions which he is about to render this year will be the result of like considerations. In truth, the former statement is less injurious than the latter; for the one professes to be history, and the other, prophecy, and more credence is usually granted to the former than to the latter. Either assertion is insulting to the judge, and must be intended to discredit him, and to impair the confidence of the public, both in him and in judicial proceedings, and to bring the law and its administration into contempt. On the other hand, judges are but men, and, perhaps, but little less liable than other men to act upon improper motives, and, when they do so, should not be protected from denunciation. The most unfortunate feature of these proceedings is, that the one party or the other must be condemned without any hearing, or, at least, without an impartial hearing. The judge, on his part, has not the semblance of a hearing, and receives from the public press, without any opportunity of defense, both his conviction and his punishment. The press, on its part, may be heard in opposition to a rule to show cause why it should not be punished for contempt; but the hearing ordinarily comes before, and is determined by, the judge whose conduct has been assailed, and if, as may sometimes happen, he has the characteristics attributed to him, there can be no doubt of his decision. It is, perhaps, the safer rule to hold that no publication can be punished as a contempt of court, unless it may possibly affect, or be intended to affect, the de-

cision of a cause, or of some motion or other proceeding therein, and, therefore, if a cause has finally terminated, reflections upon the members of the court in respect to it, though libelous, are not punishable as contempts. It has also been held that, though a cause is still pending, a publication concerning it and the probable action of the court cannot be treated as a contempt, if such publication, though attributing to the court motives which ought not to affect its action, nevertheless was not of a character designed to affect such action. Thus, a newspaper, in publishing what purported to be an interview with a resident of Montana respecting a cause pending in one of the counties of that state, and involving a very large sum of money, stated it to be his opinion that all the people of the county were prejudiced respecting the cause, and that the judge had been elected because his views were known and were believed to be unchangeable, and that neither a judge nor a jury could be found in the county to give the cause a fair trial. This publication was held not to constitute a contempt, for the reason that there was nothing therein tending to prejudice anyone respecting either of the litigants or the merits of their cause, and that attributing to the judge or to the people of the county bias and prejudice could not make them more biased or prejudiced, and, therefore, could not have been intended to affect any decision of the controversy: *In re MacKnight*, 11 Mont. 126; 28 Am. St. Rep. 451.

Reflections upon the judge personally, however libelous, are not contempts of court, if they do not refer to the discharge of the functions of his office, and are not of a character to embarrass or unduly influence the decision of a cause: *Neel v. State*, 9 Ark. 263; 50 Am. Dec. 209; *Ex parte Hickey*, 4 Smedes & M. 751.

The publication complained of may be inserted in a newspaper without the previous knowledge of the publisher. Proof of this fact does not establish that he has not been guilty of a contempt of court, but is always admissible to mitigate his punishment: *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 528.

If the publication consists of a report of proceedings alleged to have taken place in court, the accused should be permitted to offer evidence tending to prove that his report was correct, if the prosecution is under a statute making it a contempt of court to publish a false or grossly inaccurate report of judicial proceedings: *In re Robinson*, 117 N. C. 533. If the publication is of an ambiguous character, and may or may not have been intended to be a reflection on the court in the discharge of its duties, and it is fairly susceptible of an innocent meaning, the answer of the accused, disclaiming that he intended any imputation upon the court, or any embarrassment of the administration of justice, has, in some cases, been treated as conclusive in his favor: *Fishbeck v. State*, 131 Ind. 304; *Cheadle v. State*, 110 Ind. 301; 59 Am. Rep. 199; *Percival v. State*, 45 Neb. 741; ante, p. 568. Whatever we may think of the rule itself, there can be no doubt that it has sometimes been so applied as to turn a proceeding for the punishment of contempt into a mere farce, and never more clearly so than in the principal case and in the subsequent one of *Rosewater v. State*, decided by the same court in March, 1896. The publication in question in each of these cases was headed "Justice without equality. Sentences adjusted to fit men. One party to a crime gets five years' sentence in the penitentiary, while another gets the benefit of a pull." The accused in the principal case denied the writing of these headlines, but admitted the writing of the body of the article, and this clearly was fairly represented by the headlines; while in the *Rosewater* case, as the accused was the publisher of the paper, he must have been responsible for the headlines as well as for the body of the article. In both cases, the answer of the accused was treated as conclusive. In our judgment, to charge a sentence to be the result of a "pull," is the most serious charge which can be preferred against a judge, and no innocent meaning can possibly be attributed to it. The true rule upon this subject was, we think, thus stated by the supreme court of Illinois: "It need hardly be said that we cannot ac-

cept, as a reason for discharging the rule, the disclaimer of the answer of any intentional disrespect or any design to embarrass the administration of justice. The meaning and intent of the respondents must be determined by a fair interpretation of the language they have used. They cannot escape responsibility by claiming that their words did not mean what any reader must have understood them as meaning": *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 528. Nor, in our judgment, where the language is ambiguous, is the disclaimer of the accused necessarily conclusive. Evidence of witnesses may be received to show the intent and meaning of the publication, and whether it, in their opinion, referred to the court or judge. "The same rule must be applicable as when the publication is alleged to be libelous. Otherwise, a publication, the meaning of which was well known and understood, would not be a contempt, provided it was couched in ambiguous language, and did not so show on its face, if the author denied it to be such, or that it did not, or was not intended to, refer to a court, judge, or judicial proceedings": *Henry v. Ellis*, 49 Iowa, 205.

PAXTON & HERSHEY IRRIGATING CANAL & LAND CO. v. FARMERS' & MERCHANTS' IRRIGATION & LAND CO.

[45 NEBRASKA, 884.]

CONSTITUTIONAL LAW—TITLES OF STATUTES.—A constitutional provision, that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title," does not prohibit comprehensive titles, but is intended to prevent surreptitious legislation.

CONSTITUTIONAL LAW—TITLE OF STATUTE.—In an act entitled, "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes," the word "irrigation" is used in its popular sense, and implies the means of conducting water to the land to be supplied. A provision in such act for the acquiring, by irrigating companies, a right of way for canals and ditches, is germane to its title, and within the evident purpose thereof.

EMINENT DOMAIN—CONSTITUTIONAL LAW.—To the legislature, and not to the courts, has been committed the power to determine when the exigencies of the public demand the taking of private property for public use, the limit of judicial interference being the duty to declare void acts clearly violative of the fundamental law of the state.

EMINENT DOMAIN—PUBLIC USE.—There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the elements of public utility. A public use need not be for the benefit of the whole public: it may be for the benefit of the inhabitants of a small or restricted locality, but the use and benefit must be in common, and not to particular individuals.

EMINENT DOMAIN—IRRIGATION.—The use of water for irrigation purposes may become a public use, and it does so become under the operation of the "Rayner Irrigation Law" of Nebraska, and companies organized and operating under that law have power to acquire a right of way for necessary canals and reservoirs by condemnation.

STATUTES—CONSTRUCTION.—If a word in a statute is evidently an interpolation, having no relation to the body of the act, and without sensible meaning, it should be disregarded.

IRRIGATION—CONSTRUCTION OF STATUTE.—A statute conferring upon irrigation companies power to acquire a right of way for

necessary canals and reservoirs, and providing that "no tract of land shall be crossed by more than one ditch," includes lands owned by corporations.

STATUTES—CONSTRUCTION.—A proviso in a statute which operates to limit the application of the enacting clause, general in its terms, is to be strictly construed, and includes no case not within the letter of the exception.

IRRIGATION—CONSTRUCTION OF STATUTE.—A statute conferring upon an irrigation company power to acquire a right of way for necessary canals and reservoirs, does not, in the absence of express provision, confer upon it the right to connect with the ditches of another company, nor to take water therefrom, without the consent of the latter company.

IRRIGATION—CONSTRUCTION.—A statute conferring upon an irrigation company power to acquire a right of way for necessary canals and reservoirs, and providing that "no tract of land shall be crossed by more than one ditch, canal, or lateral without the written consent and agreement of the owner thereof, if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended," implies that no tract of land shall, without the consent of the owner, be burdened with two or more ditches for watering the same territory. The question is not, whether the first ditch may be so enlarged or extended as to answer the purpose for which the second was designed, but whether it may, as constructed, be made to supply the lands within the reach of both.

F. T. Ransom and T. F. Gantt, for the appellant.

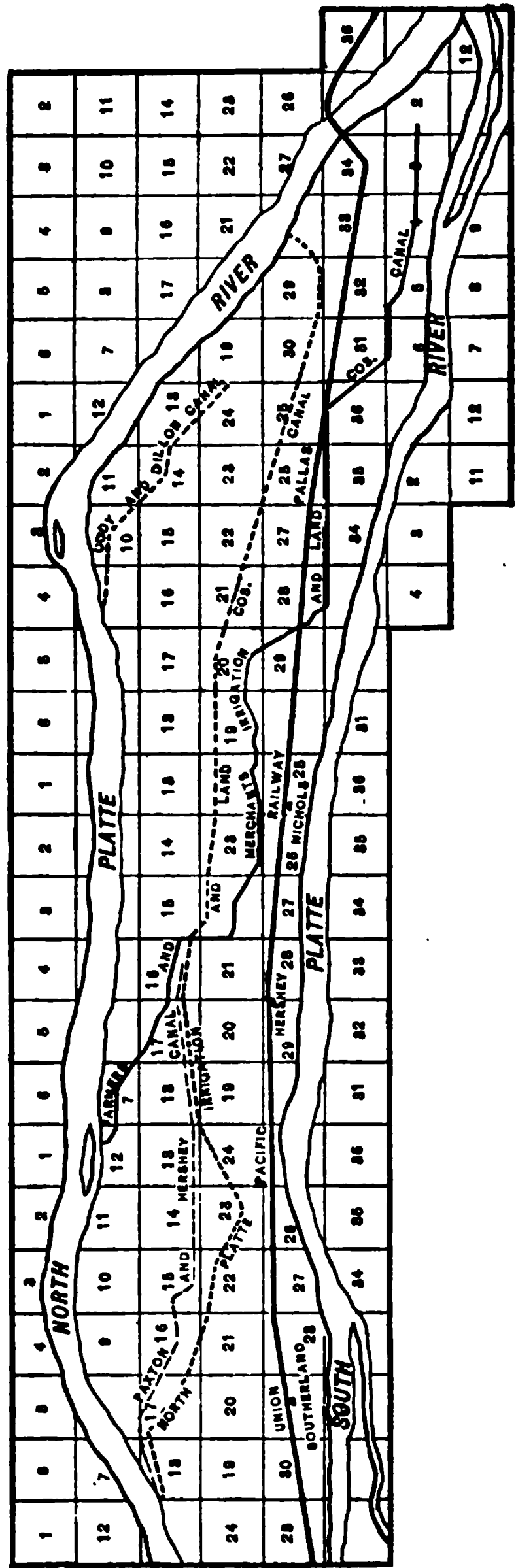
T. C. Patterson and Grimes & Wilcox, for the appellees.

⁸⁸⁷ POST, J. This is an appeal from a decree of the district court for Lincoln county dismissing the action of the plaintiff company, whereby it seeks to prevent the appropriation by the ⁸⁸⁸ defendant of a right of way through its lands for an irrigating canal. In the petition it is, in substance, alleged that the plaintiff company is the owner of ten thousand acres of land, bounded by the North Platte river, in Lincoln county, and also of an irrigating canal known as the "Paxton & Hershey ditch," situated on its said lands and on the lands of other adjoining proprietors; that upon its said land, and nearly parallel with the ditch above mentioned, is an irrigating canal known as the "North Platte Irrigating & Land Company's ditch," and herein referred to as the North Platte ditch," and that in the vicinity of the plaintiff's lands sought to be watered by the defendant's proposed canal is an irrigating canal known as the "Cody & Dillon ditch." The plaintiff, it is alleged, has constructed a large number of laterals from its said canal, which it is proposed by the defendant company to cross, thus necessitating the construction and maintaining of many bridges, flumes, and conduits, and otherwise needlessly harassing it in the use and enjoyment of its said property. The defendant company, which is organized for the purpose of building and maintaining ditches, canals,

aqueducts, and reservoirs for the storage and conveyance of water, and of selling water to consumers for irrigating, power, and other useful purposes, prior to the commencement of this action, entered upon the plaintiff's said land, and located and staked out a ditch thereon four and one-half miles in length, and is taking steps to condemn a right of way therefor, but that the three ditches above described afford ample facilities for the irrigation of all of the land sought to be supplied by the defendant company, and that water sufficient to supply the defendant's wants can be furnished from the ditches already constructed, should connection be made therewith, at less expense than by the construction and maintaining of the proposed ditch through the plaintiff's land to the source of supply, the North Platte river. The answer, so far as it is deemed necessary to notice it, consists of an allegation ⁸⁸⁹ that the defendant is engaged in the construction of an irrigating canal, some twenty miles in length, for the purpose of supplying with water from the North Platte river certain territory not within the reach of either of the canals already constructed, a denial that the plaintiff's canal is capable of supplying the lands which the defendant proposes to water, and an allegation that the water supplied by said canal is barely sufficient for the irrigation of the plaintiff's own land. Accompanying the pleadings is a map showing the location of the proposed ditch, as well as those already completed, and which is essential to a perfect understanding of the question at issue. (See next page.)

The district court, upon entering the decree complained of, submitted the following findings of fact and conclusions of law:

"1. The plaintiff is a corporation organized and existing under and by virtue of the laws of this state for the following purposes: To construct, own, operate, and maintain a canal or canals, ditch or ditches, for irrigation purposes, to purchase, acquire, own, sell, and convey all real estate that may be necessary for such purposes, and to acquire, own, sell, and convey real estate in connection with carrying on an irrigating business, and to acquire, own, sell, and convey real estate for other purposes deemed advisable or advantageous to the corporation and its interest, and to cultivate and improve such lands as shall be owned by the corporation; to furnish, sell, or rent water for irrigation of lands which shall be owned by said corporation and within its area and other lands within reach of any canal or canals which shall be owned, operated, or controlled by the corporation owning livestock and raising the same in connection with the land held or controlled by this corporation.



"2. The plaintiff is the owner of about seven thousand acres of land located on and adjacent to the banks of the North Platte river, in Lincoln county, Nebraska, as alleged in its ⁸⁹¹ petition, and is the owner of an irrigating canal running across its said lands, and the lands of others, for a distance of about ten miles, which canal is finished and constructed for the purposes of irrigating the land under the said ditch, and for the purposes set forth in the articles of incorporation of the plaintiff.

"3. The defendant is a corporation organized under the laws of this state for the following purposes, among other: The building and maintaining of canals, ditches, and aqueducts and reservoirs for the storage and conveyance of water, and the selling of such water to consumers for irrigation, agricultural, power, and other useful purposes.

"4. The plaintiff is the owner of the tract of land proposed to be crossed by the proposed canal of the defendant, and which lies under the plaintiff's ditch, and which is proposed to be crossed by defendant's ditch for a distance of four miles and a half.

"5. All of the land of the plaintiff across which the defendant proposes to construct its canal, for a distance of four and a half miles, can be irrigated from and by plaintiff's canal, and it is not proposed by the defendant to water or irrigate any of plaintiff's said land within said four miles and a half.

"6. That the defendant corporation is the owner of no land to be watered by its proposed ditch, but that the object of said corporation is for the purpose of constructing and operating a canal or ditch for irrigation purposes for the lands lying contiguous under said ditch for other parties to hire.

"7. That at the points where it is alleged that the defendant's ditch crosses the lands of the plaintiff, it is necessary for the defendant to run said ditch across said lands, in order to get its water out of the North Platte river, with necessary fall in accordance with the surveyed route of its ditch; that in the territory covered by the ditch of the plaintiff, it is not the object nor the purpose of the ⁸⁹² defendant's ditch to irrigate said land, but lands lying below and beyond the territory of the plaintiff's ditch.

"8. There are about forty thousand acres of land between the North and South Platte rivers, and in this territory the evidence shows that the North Platte Ditch Company has a ditch about twenty miles long running through the middle portion of the peninsula formed by the two rivers. The plaintiff's ditch is

also constructed in this peninsula, and is in length about ten miles. The Cody & Dillon ditch is also in this peninsula, and is about six miles in length. A great amount of evidence has been taken to show the capacity of these several ditches for watering the land in the peninsula, including the land proposed to be watered by the defendant's ditch. The location of these several ditches in the peninsula, their dimensions and their capacity, appears from the evidence and the maps introduced in the evidence, but the court does not find nor pass upon the evidence relating to the question as to whether or not this water could be supplied by the defendant's constructing their ditch up and to the plaintiff's ditch, and receiving water therefrom, for the reason there is no provision in the act contemplating it is obligatory upon the defendant to so do.

"9. The court further finds that the defendant's proposed ditch will cross the lands of the plaintiff through which plaintiff's ditch has already been built, which lands are also irrigated from plaintiff's ditch.

"10. The court further finds that the plaintiff has not given its written consent to cross the lands owned by it proposed to be crossed by the defendant with its said proposed canal, and objects to its appropriation of its lands for the purpose of constructing the defendant's said ditch over the same.

CONCLUSIONS OF LAW.

"1. That section 2034 [Irrigation Law of 1889, art. 1, sec. 3] is not applicable to the facts in this case, for the reason that the defendant's contemplated ditch is not being ⁸⁹³ constructed for the purpose of irrigating the lands crossed by the plaintiff's ditch, nor the lands lying under the plaintiff's ditch, but for the purpose of irrigating lands beyond and below the plaintiff's ditch.

"2. That the defendant is entitled to cross the lands of the plaintiff for the purpose of constructing its said ditch, on complying with the necessary requirements of law for said purpose."

It will be observed from the foregoing statement and opinion that the defendant's claim to a right of way for its canal through the plaintiff's land is founded upon the provisions of the act of March 27, 1889, known as the "Rayner Irrigation Law," entitled, "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes, and to repeal sections one hundred and fifty eight (158) and one hundred and fifty-nine (159) of chapter 16 of the Compiled Statutes of 1887, entitled 'corporations.'"

The first contention of this appeal is, that the provision for the

acquiring by corporations of the right of way for irrigating ditches, in the exercise of the power of eminent domain, is foreign to the title of the act mentioned, and accordingly violative of section 11, article 3, of the constitution, viz: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." The object of the foregoing provision has been declared not to prohibit comprehensive titles, but to prevent surreptitious legislation, by advising representatives of the nature and purpose of the measures they are called upon to support or oppose: *Kansas City etc. R. R. Co. v. Frey*, 30 Neb. 790; *In re White*, 33 Neb. 813; *Trumble v. Trumble*, 37 Neb. 340; *South Omaha v. Taxpayers' League*, 42 Neb. 671. It is said in *In re White*, 33 Neb. 813, that the legislature has the right to choose the title to any act passed by it, and, although that chosen may not be the most appropriate, the act will not be held void, unless clearly in conflict ⁸⁹⁴ with the constitution. When tested by that rule, we cannot doubt that the provision assailed is germane to the title of the act, and within the evident purpose thereof, viz., the utilizing of the public waters in the further development of the agricultural resources of the state. The word "irrigation," as employed in the title of the act under consideration, is apparently used in its popular sense, and denotes the application of water to land for the production of crops: *Platte Water Co. v. Northern Colorado Irr. Co.*, 12 Col. 525. The use of water for the purpose of irrigation clearly implies the means of conducting it to the land to which it is applied, and any plan, such as contemplated by the act of 1889, which omits provision for the enforced access by the public to the source of supply is necessarily partial and ineffective.

2. The act, in so far as it makes provision for the acquiring of the right of way for irrigating canals by condemnation, is also vigorously assailed, on the ground that it contemplates the taking of property for private use only, and therefore in conflict with section 21 of the bill of rights, viz: "The property of no person shall be taken or damaged for public use without just compensation therefor." This provision has been held to prohibit, by implication, the taking of private property for private use of any character whatever without the consent of the owner: *Jenal v. Green Island etc. Co.*, 12 Neb. 163; *Welton v. Dickson*, 38 Neb. 767; 41 Am. St. Rep. 771. In the last-mentioned case, it was held, following *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, that the want of power in the legislature to transfer to one person the property of another does not necessarily depend upon constitu-

tional restrictions, but upon the fact that such authority is, in no sense, an incident to the powers conferred upon the law-making branch of the government. We are thus, for the first time, confronted with the question, whether the use contemplated by the statute is a public one in a constitutional sense, or whether it is a mere ⁸⁹⁵ private use, and accordingly within the prohibition mentioned. In this connection, it should be observed that to the legislature, and not to the courts, has been committed the power to determine when the exigencies of the public demand the taking of property for public uses, the limit of judicial interference being the duty to declare void acts clearly violative of the fundamental law of the state. There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the elements of public utility. It has been said by an eminent jurist: "The public use required need not be the use or benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, and not to particular individuals or estates: See Chancellor Zabris-
 kie in *Coster v. Tide Water Co.*, 18 N. J. Eq. 54. Again, it has been said that "the use is public when it promotes the interests of a considerable portion of the community, although it may not benefit the community at large": Kinney on Irrigation, sec. 94. See, also, Black's Pomeroy on Water Rights, 174; *Lux v. Haggin*, 69 Cal. 304; *Oury v. Goodwin*, 26 Pac. Rep. 376 (Ariz., Jan. 24, 1891); *Umatilla Irr. Co. v. Barnhart*, 22 Or. 389; *Foster v. Park Commrs.*, 133 Mass. 321; *Hagar v. Reclamation District*, 111 U. S. 701; *Wurts v. Hoagland*, 114 U. S. 606; *Pocantico Water Works Co. v. Bird*, 130 N. Y. 249. In the last-mentioned case, we observe the following pertinent language: "The term 'public use,' as used in connection with the right of eminent domain, is not easily defined. . . . It is doubtless true that, in order to make the use public, a duty must devolve upon the persons or corporation holding the property to furnish the public with the use intended. The term implies 'the use of many,' or 'by the public,' but it may be limited to the inhabitants of a small or restricted locality, but the use must be in common, and not for a particular individual." It has been said that if, by any ⁸⁹⁸ reasonable construction, a designated use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court (*Blankhead v. Brown*, 25 Iowa, 540; *In re Bonds of Madera Irr. Dist.*, 92 Cal. 309; 27 Am. St. Rep. 106; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54).

which, however, is but the application of a fundamental principle of our system, viz., the independence of each department of the government within its own domain. It should be remembered, too, that the essential features of the "Rayner Irrigation Law" appear in the legislation of the several Pacific states, notably of California, whose constitutional provisions on the subject do not differ substantially from ours, and where it had, long previous to its adoption by us, received a definite construction adverse to the contention of the plaintiff herein: See *Lux v. Haggin*, 69 Cal. 304. The legislature must, therefore, have intended to adopt, not the statute alone, but the construction placed upon it in the state of California. Such is the well-established rule: *Bohannon v. State*, 18 Neb. 57; 53 Am. Rep. 791. But any examination of this subject is necessarily incomplete which omits mention of the recent case of *Bradley v. Fallbrook Irr. Dist.*, 68 Fed. Rep. 948, holding that assessments under the provisions of the district irrigation law of that state contemplate the taking of property for mere private purposes and accordingly within the prohibition of the United States constitution. It is unnecessary, however, at this time to examine the reasoning upon which that case rests, since it is therein declared inapplicable to the ordinary use of water for irrigating purposes in the arid region of California, and therefore in harmony with *Lux v. Haggin*, 69 Cal. 304, and the later cases in which the same doctrine is asserted by that court. The varying conditions of society are constantly presenting new subjects of public utility, which is but another name for public necessity, hence the force of Chancellor Vroom's remark in *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756, that what shall be deemed a ⁸⁹⁷ public use depends somewhat on the situation and wants of the community for the time being. Nor were the conditions surrounding the people of the Pacific states, when the foundation was laid for the body of their laws upon the subject, materially different from those which to-day confront the western half of our own state. We behold what was but yesterday the public domain, occupied to the western limit of the rain-belt, so-called, and settlers eagerly seeking for homes in the semi-arid region beyond. We behold thousands of acres of fertile land in the valleys of the Platte, the Loups, the Elkhorn, and the Republican rivers, practically worthless under existing conditions for the purpose of agriculture, but which, by application of the waters of those streams, may be made most productive, thus not only supporting the rapidly increasing population of that region, but adding

largely to the wealth and material prosperity of the state. That an undertaking so important can be successfully prosecuted alone through the agency of the state none can doubt. The reclamation of a region so vast, equal in extent to more than one state of the Union, is surely a legitimate function of government. And the exercise of the reserve power of the state in the promotion of an enterprise so beneficial is not, even in a technical sense, violative of the restrictive features of the constitution.

3. It is next argued that authority to appropriate land for right of way purposes is, by the law of 1889, conferred upon property owners only, and, it being admitted that the defendant company is not the owner of any of the lands lying under its ditch, is not within the provisions of the act. The purpose of sections 1, 2, 3, and 4 of article 2, to which we are referred in support of that contention, was, apparently, to confer upon individuals and corporations the right of way in certain cases through the premises of adjoining proprietors. It is, however, unnecessary to examine the provisions mentioned, since the plaintiff's argument is based upon an apparent misconception of the defendant's claim, ⁸⁹⁸ which is under the provisions of sections 8 and 9 of article 2, viz:

"Sec. 8. If any corporation organized under the laws of this state for the purpose of constructing and operating canals for irrigating or water power purposes, or both, may acquire a right of way over or upon any land for the necessary construction of such canal, including dams, reservoirs, and all necessary adjuncts to said canals, in the same manner as provided for persons and companies in this act, and such persons, canal companies, and corporations shall have the same power to occupy state lands with their said canals as is given to railroad corporations by section 105, chapter 16, of the Compiled Statutes of 1887; and such corporations shall also have power to borrow money and to mortgage all their property and franchises in the same manner and for the same purposes as railroad companies. . . .

"Sec. 9. Canals constructed for irrigating or water power purposes, or both, are hereby declared to be works of internal improvement, and all laws applicable to works of internal improvement are hereby declared to be applicable to such canals."

The first word of section 8, as it appears above, is evidently an interpolation, having no relation to the body of the section, without sensible meaning, and should, accordingly, be disregarded in giving effect to the provisions of the act: *Stone v. Yeovil*, 1 O. P. Div. 701; *United States v. Stern*, 5 Blatchf. 512; *State v.*

Beasley, 5 Mo. 91; State v. Acuff, 6 Mo. 55. A careful reading of the two sections last named, with the word "if" eliminated from section 8, leaves no room to doubt that the defendant company is within the terms of the act, and that the plaintiff's claim to the contrary is without merit.

4. It is by the plaintiff further argued that it is within the exception contained in section 3, article 1, as follows: "No tract of land shall be crossed by more than one ditch, canal, or lateral without the written consent and agreement ⁸⁹⁹ of the owner thereof, if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended." The evidence relating to this branch of the case is quite voluminous, although the district court, as appears from its findings and conclusions of law, held the foregoing exception not applicable to the facts, without determining the question of the capacity of the ditch as already constructed. On behalf of the defendant, it is contended, in effect, that the exception of the statute applies to owners and proprietors other than irrigating companies, which corporations, it is argued, are not, in terms or by implication, included therein. The case of San Luis Land etc. Co. v. Kenilworth Canal Co., 3 Col. App. 244, it is conceded, tends to sustain that contention. Referring to the Colorado statute, which provides that no tract or parcel of improved or occupied land shall be burdened with two or more ditches, etc., it is said in the case cited: "We are wholly unable to understand how it can be urged that the defendant company has any right under the provisions of these sections. They clearly, and in unmistakable language, apply to the right of the owner of the lands to assert that his property shall not be burdened with more than one irrigating ditch, provided that one ditch be of sufficient capacity to carry water for the purposes contemplated by the act." We are, however, unable to accept that case as an authoritative interpretation of our statute. The term "no tract of land," as employed, without qualifications, must be held to include the property of corporations, as well as natural persons; and such would have been the construction had the statute read, "the land of no person shall be crossed," etc: Wales v. Muscatine, 4 Iowa, 302; Ricker v. American Loan etc. Co., 140 Mass. 346; Norris v. State, 25 Ohio St. 217; 18 Am. Rep. 291. But we reach the same conclusion as the district court—presumably by the same course of reasoning—by which the sections are transposed, section 8 of article 2 being regarded ⁹⁰⁰ as the enacting clause, and section 3 of article 1 as a proviso exempting the exceptional cases therein

contemplated from the operation of the act. According to settled rules of construction, a proviso which would operate to limit the application of an enacting clause, general in its terms, will be strictly construed, and includes no case not within the letter of the exception: Endlich on Interpretation of Statutes, sec. 186; United States v. Dickson, 15 Pet. 141; Roberts v. Yarboro, 41 Tex. 449; Epps v. Epps, 17 Ill. App. 196. Referring again to the proviso involved, we are first impressed with the fact that the primary object thereof is the protection of landowners, rather than the proprietors of irrigating ditches. True, both characters may, as in this instance, be united in one person or corporation, but such cases are exceptions, and apparently not within the contemplation of the legislature. It is, in the second place, noticeable that the act is silent respecting the terms and conditions upon which one irrigating company may make use of the canal or ditch of another. Nor is the proprietor of such a ditch in terms required to supply water upon any terms to a rival corporation. It was at the consultation suggested that it is within the power of a court of equity to prescribe the conditions upon which one irrigating company may connect with the ditch of another; but that assertion rests, to say the least, upon doubtful grounds. Conceding irrigating companies, as quasi public corporations, to be subject to the strict obligations of common carriers, it does not follow that they may, by the courts, be compelled to enter into particular agreements, or assume particular relations, however just and equitable, toward each other. That subject has recently engaged the attention of the supreme court of the United States, by which the power to prescribe terms for the interchange of business by connecting carriers is declared to be legislative, rather than judicial, in character, notwithstanding the provisions of the interstate commerce act: Atchison etc. Ry. Co. v. ²⁰¹ Denver etc. Ry. Co., 110 U. S. 667; Pullman Palace Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587; Express Cases, 117 U. S. 1; Little Rock etc. R. R. Co. v. St. Louis etc. R. R. Co., 41 Fed. Rep. 559. See, also, Beach on Private Corporations, 839; Kentucky etc. Bridge Co. v. Louisville etc. Ry. Co., 37 Fed. Rep. 567; Shelbyville R. R. Co. v. Louisville etc. R. R. Co., 82 Ky. 541. The precise limits within which courts of equity will interfere in such cases, in order to regulate or enforce the reciprocal obligations of corporations, is a question foreign to the present controversy, although the authorities cited serve to illustrate the difficulties attending the interpretation placed upon the statute by counsel for plaintiff. We are, after a careful analysis

of the language of the exception, unable to say that it contemplates the connecting of different canals, or that it imposes upon one irrigating company any duty to supply water for use by the patrons of another. What the statute implies is, that no tract of land shall, without the consent of the owner, be burdened with two or more ditches for the watering of the same territory. The question is not, whether the first ditch may be so enlarged or extended as to answer the purpose for which the second is designed, but whether it may, as constructed, be made to supply the lands within reach of both. That the purpose of the defendant is to water lands which cannot be accommodated by the plaintiff, but which, in the language of the district court, "lie below and beyond its ditch," as now constructed, is clearly established by the proofs and apparent from an inspection of the foregoing map. Nor can the fact that the plaintiff concedes the defendant's right to connect with its ditch, and offers to supply the latter with water on terms confessedly reasonable, be regarded as material, since, as we have seen, the law imposes upon the plaintiff no such duty.

It follows, without further elaboration, that the decree of the district court is right and must be affirmed.

EMINENT DOMAIN.—THE QUESTION WHETHER A NECESSITY EXISTS FOR THE TAKING of private property for the public use is a legislative, and not a judicial, one: *Lynch v. Forbes*, 161 Mass. 302; 42 Am. St. Rep. 402, and extended note thoroughly discussing the subject.

EMINENT DOMAIN—PUBLIC USE—HOW DETERMINED.—What is a public use is an unsettled question. Such use is not limited to actual use and occupation by the state, or by a public political corporation, or by a private corporation whose sole, or even primary, object is the public good: *Scudder v. Trenton etc. Falls Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756. A use may be public though it benefit but a limited portion of the community: *Aldrige v. Tuscumbia etc. R. R. Co.*, 2 Stew. & P. 199; 23 Am. Dec. 307, and note. A work may be of public use though owned and conducted by a private corporation: *Willyard v. Hamilton*, 7 Ohio, pt. 2, 111; 30 Am. Dec. 195, and note. See, especially, on this subject, the extended note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 686.

EMINENT DOMAIN.—THE PROPERTY OF A CORPORATION is subject to the right of eminent domain, as well as the property of private individuals: *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.*, 11 Leigh, 42; 36 Am. Dec. 375.

EMINENT DOMAIN—IRRIGATION.—The interests of riparian proprietors in a stream of water may be appropriated to a public use by a state in the exercise of the right of eminent domain: *Cooper v. Williams*, 4 Ohio, 253; 22 Am. Dec. 744. See, on this subject, the case of *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, and note, and the extended note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 611.

STATUTES—CONSTRUCTION.—A proviso in a statute is not to enlarge the operation of the enacting clause: *Salling v. McKinney*, 1 Leigh, 42; 19 Am. Dec. 722.

STATUTES.—The object of the constitutional provision that a statute shall contain but one subject, and that that subject must be expressed in the title, is treated in the extended note to *Davis v. State*, 61 Am. Dec. 838. And see, also, the note to *Tuttle v. Strout*, 82 Am. Dec. 110.

DIERS v. MALLON.

[46 NEBRASKA, 121.]

ARREST WITHOUT WARRANT.—THE AUTHORITY OF A CONSTABLE, SHERIFF, OR OTHER PEACE OFFICER to arrest without process, upon reasonable suspicion, one who is charged with the commission of a felony, and to retain him for a reasonable time, until a warrant can be procured, is well established.

ARREST WITHOUT WARRANT.—A PEACE OFFICER IS NOT LIABLE for making an arrest, though the person arrested is innocent of the crime for which he is arrested, if such arrest is made upon reasonable ground of belief that the person arrested is guilty.

REASONABLE GROUND FOR ARREST, WHEN A QUESTION OF LAW.—If there is no conflict in the evidence, the court may, as a matter of law, instruct the jury that there was reasonable ground for the belief, on the part of an officer making an arrest, that the party arrested was guilty of the crime for which he was apprehended.

PROBABLE CAUSE FOR AN ARREST is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.

PROBABLE CAUSE FOR AN ARREST IS ESTABLISHED, as a matter of law, by evidence showing that a person then in custody, charged with the commission of a murder, asserted that he was procured to commit it by the person arrested; that the decedent in his lifetime had expressed fears of being murdered by that person, who was also represented to be of a bad and dangerous character.

JURY TRIAL—QUESTION OF LAW.—If the question is, whether a person, arrested by a peace officer without a warrant, was detained an unreasonable length of time, it may be determined by the court, as a matter of law, if there is no conflict in the evidence upon the subject.

THE DETENTION OF A PRISONER, ARRESTED WITHOUT WARRANT on a charge of murder, is not unreasonable, though he is not taken before the magistrate until the third day after his arrest, if the first day was Sunday, and the arresting officer at once called the attention of the prosecuting attorney to the matter, detailing the facts and requesting that a complaint be prepared and a warrant issued, and such attorney promised to at once comply with the request.

THERE IS NO ERROR IN REFUSING INSTRUCTIONS upon matters which it is the duty of the court to determine for itself as matters of law, and which it does so determine.

FALSE IMPRISONMENT—CHARACTER AND REPUTATION OF PLAINTIFF.—In an action for false imprisonment, evidence of the good reputation of the plaintiff prior to his arrest without warrant is not admissible, where no attempt has been made to show that such reputation was bad.

DUTY OF OFFICER TO INQUIRE RESPECTING REPUTATION OF PERSON ARRESTED.—An officer knowing that a murder has been committed, and receiving information sufficient to raise an honest belief on his part, as a prudent man, that a particular person is guilty thereof, cannot be adjudged negligent, because he did not make

Inquiries among the neighbors of the accused as to his habits, standing, and character before arresting him, without first having a warrant commanding such arrest.

TREATMENT OF PRISONER.—IN AN ACTION FOR FALSE IMPRISONMENT in making an arrest and detaining the plaintiff without warrant, and placing him in irons, the question to be submitted to the jury is, whether the defendant used force and violence upon the person of the plaintiff in excess of what was reasonably necessary, under the circumstances, to safely detain and keep him; and, if there was no such excess, there can be no recovery, provided the circumstances were such as to justify the arrest, though it was subsequently ascertained that the plaintiff was not guilty of the crime of which he was accused.

A SHERIFF OR OTHER PEACE OFFICER HAS A DISCRETION RESPECTING THE MEANS to be adopted to safely keep a person arrested by him without warrant, but with reasonable ground to believe him to be guilty of committing a felony, and though he was put in irons, and is afterward shown to have been innocent, the officer is not liable in damages, if the precautions adopted were, at the time, honestly believed by him to be necessary and reasonable.

C. Hollenbeck and N. H. Bell, for the plaintiff in error.

W. H. Munger and Frick & Dolezal, contra.

123 NORVAL, C. J. This was an action for false arrest and imprisonment by Herman Diers against James P. Mallon, as principal, E. William and others, as sureties on the official bond of said Mallon, as sheriff of the county of Dodge. There was a verdict for the defendants, a new trial was denied, and judgment was entered upon the verdict. Plaintiff prosecutes error.

The facts in the case, as disclosed by the record before us, are, in substance, as follows: On the tenth day of December, 1889, one Carlos F. Pulsifer was murdered near the village of Crowell, in Dodge county. A day or two later, the defendant sheriff arrested and held in his custody, in the jail of said county, Charles Shepherd and Christian Furst upon the charge of having committed said murder. During said imprisonment, and on the thirteenth day of said month of December, the sheriff was present at a conversation had between said Shepherd and the attorney of the latter, T. M. Franse, Esq., in which the former stated to the latter, in substance and effect, that the plaintiff Diers **124** had hired him, Shepherd, to kill and murder said Pulsifer, which statement said Shepherd reiterated in the presence and hearing of the officer; that at the same time Mr. Franse said he was not surprised, or words to that effect; that he knew that someone was behind it, and, further, Pulsifer had stated, during his lifetime, that if he was ever murdered, it would be by Diers; that Mr. Franse also stated that Diers, the plaintiff, was a bad man, by which the sheriff understood that plaintiff was a vicious man, and one difficult to handle. On the fourteenth day of December, Mr. Mallon took the train for Norfolk, and while going he

had a conversation with Judge Crawford, of West Point, with whom he was acquainted, regarding the murder, and of whom he made inquiry in regard to the reported statement, above referred to, claimed to have been made by Pulsifer in his lifetime, and Judge Crawford informed the sheriff that Mr. Romberg had stated in West Point that Pulsifer had made the statement, "if he was killed, that Diers would be the one that would murder him"; that the judge also informed him that, years before, there were a number of incendiary fires at West Point, and that Diers was strongly suspicioned as being the perpetrator of the crimes; that it was getting pretty hot for Diers, and an attorney was consulted, who advised Diers to enlist in the army to prevent his being prosecuted, and he thereupon did so. On the information thus received from Shepherd, Franse, and Crawford, the defendant Mallon, on returning home from Norfolk, on Sunday, December 15th, without any warrant, arrested Diers on the train for being implicated in the murder of Pulsifer; that plaintiff, upon being told that he was charged with murder, inquired of the sheriff, "Is it murder, or knowing of murder?" After the arrest of Diers, he was handcuffed, and in that condition brought to Fremont on the cars, and from the depot he was taken in a carriage to the jail, where he was placed and confined in one of the bedrooms in the living apartment of the jail ¹²⁵ until December 19th. Within an hour after reaching Fremont, which was on Sunday, the sheriff went to Mr. Loomis, the county attorney, told him of the arrest, detailed the circumstances to him, and asked that a complaint at once be filed. Mr. Loomis agreed to do so. The next morning, and several times during Monday, the sheriff saw the county attorney about it, and on Tuesday, December 17th, a complaint was duly filed with the county judge charging the plaintiff with murder, upon which a warrant was issued, and, by agreement of the parties, the hearing was postponed until the nineteenth day of December, on which day an examination was had upon the complaint, which resulted in Diers being discharged by the county judge. It is further disclosed by the testimony adduced on the trial of this cause that the examination before the county judge was not had at an earlier date, owing to the fact that the witnesses lived at so great a distance from Fremont that their attendance could not sooner be obtained; that the sheriff, at the time of the making of the arrest, believed to be true the information received from the different sources relating to Diers being implicated in the murder, and that Mr. Mallon, in arresting and detaining Diers, acted in the utmost good faith.

The ninth assignment of error, which is the first one discussed in the brief of counsel for plaintiff, is based upon the holding by the court, as a matter of law, that Mallon had probable cause for making the arrest, and in withholding that question from the jury. The point is raised by the fourth instruction given, which reads as follows:

"4. The jury are instructed the evidence in this case shows that the defendant Mallon, at the time he made the arrest complained of, had reasonable and probable cause to suspect that the plaintiff was guilty of procuring the alleged murder to be committed, although, as a matter of fact, the plaintiff was innocent of that charge. The only questions then left for the jury to determine are: 1. Did the defendant Mallon, in keeping the plaintiff in custody, use ¹²⁶ more force and violence than was reasonably necessary to safely keep and retain him in custody? In other words, is the defendant Mallon guilty of an assault and battery upon the person of the plaintiff Diers? 2. What, if any, damages has the plaintiff suffered by reason of such assault and battery?

That Pulsifer was murdered is not questioned. The plaintiff was arrested for being implicated in the crime, by the defendant Mallon, without any warrant therefore having been issued. The authority of a sheriff, constable, or peace officer, in the absence of any express statutory provision to arrest, without process, upon reasonable suspicion, one who is charged with the commission of a felony, and detain him for a reasonable time until a warrant can be procured, is most fully established by the adjudicated cases: *Rohan v. Sawin*, 5 Cush. 281; *Wade v. Chaffee*, 8 R. I. 224; 5 Am. Rep. 572; *Beckwith v. Philby*, 6 Barn. & C. 635; *Doering v. State*, 49 Ind. 56; 19 Am. Rep. 669; *Davis v. Russell*, 5 Bing. 354; *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702; *Eanes v. State*, 6 Humph. 53; 44 Am. Dec. 289; *Burnes v. Erben*, 40 N. Y. 463; *Firestone v. Rice*, 71 Mich. 377; 15 Am. St. Rep. 266; *Filer v. Smith*, 96 Mich. 347; 35 Am. St. Rep. 603; *Marsh v. Smith*, 49 Ill. 396; *Shanley v. Wells*, 71 Ill. 78; *Simmerman v. State*, 16 Neb. 615; 7 Am. & Eng. Ency. of Law, 675, and cases cited; *Cooley on Torts*, 2d ed., 202. Judge Cooley, in his valuable treatise on Torts, after discussing the liability of a private person for arresting one on suspicion of crime, observes: "A peace officer may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made on reasonable grounds of belief, he will be excused, even though it appear afterward that, in fact, no felony had been committed." The reason of the rule

is stated by Dewey, J., in *Rohan v. Sawin*, 5 Cush. 281, in the following apt language: "It has been sometimes contended that an arrest of this character, without a warrant, was a violation of the great fundamental ¹²⁷ principles of our national and state constitutions forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions, doubtless, had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon complaint made under oath. They do not conflict with the authority of constables, or other peace officers, or private persons under proper limitations, to arrest without warrant those who have committed felonies. The public safety and the due apprehension of criminals charged with heinous offenses imperiously require that such arrests be made without warrant by officers of the law. As to the right appertaining to private individuals to arrest without a warrant, it is a much more restricted authority, and is confined to cases of the actual guilt of the party arrested, and the arrest can only be justified by proving such guilt. But as to constables, and other peace officers, acting officially, the law clothes them with greater authority [than private persons], and they are held to be justified, if they act, in making the arrest, upon probable and reasonable grounds for believing the party guilty of a felony; and this is all that is necessary for them to show in order to sustain a justification of an arrest for the purpose of detaining the party, to await further proceedings under a complaint on oath and a warrant thereon."

Counsel for plaintiff insist that the question whether the sheriff had reasonable or probable ground for believing that plaintiff procured the murder to be committed should have been submitted to the jury, and, therefore, the court erred in not submitting to the jury the question to pass upon. If there was any conflict in the testimony upon the subject, then we would agree with counsel that it would have been reversible error for the court to withdraw the question of probable cause from the jury. Where the facts are in dispute, the question of reasonable ground for believing that the person arrested without process has committed, ¹²⁸ or is implicated in, a felony is for the jury, under proper instructions. Such, undoubtedly, is the general rule. But when the facts are conceded or undisputed, as is the case here, the rule is, that probable cause is a question of law for the court. A number of authorities may be cited in support of this doctrine: *Turner v. O'Brien*, 5 Neb. 542; *Ross v. Langworthy*, 13 Neb. 495; *Boyd v. Cross*, 35 Md. 194; *Burns v. Erben*, 40 N. Y. 463;

Hamilton v. Smith, 39 Mich. 222; **Huntington v. Gault**, 81 Mich. 155; **Perry v. Sulier**, 92 Mich. 72; **White v. McQueen**, 96 Mich. 249; **Filer v. Smith**, 96 Mich. 347; 35 Am. St. Rep. 603.

Did Mallon have reasonable or probable cause for arresting the plaintiff? In determining this point, it is important to keep in mind the meaning of "probable cause." We know of no clearer definition of that term than the one given by the court of appeals of Maryland in **Johns v. Marsh**, 9 Md. L. Rep. 143, in the following language: "Probable cause, according to the definition adopted by this court, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty: **Boyd v. Cross**, 35 Md. 197; **Cooper v. Utterbach**, 37 Md. 282. It is very true, probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation. It is made to depend upon knowledge of facts and circumstances which were sufficient to induce the defendant, or any reasonable person, to believe the truth of the accusation made against the plaintiff, and that such knowledge and belief existed in the mind of the defendant at the time the charge was made or being prosecuted, and were, in good faith, the reason and inducement for his putting the law in motion." Applying the foregoing to the case under consideration, did the trial court wrongfully determine, as a matter of law, that the sheriff had probable ground for making the arrest? We are firmly ¹²⁹ convinced that the question must be answered in the negative. The uncontradicted facts and circumstances under which the officer acted, as disclosed by this record, were of such a character that any reasonable or prudent person, divested of passion or prejudice, would have fairly suspected and believed that plaintiff was implicated in the murder of Pulsifer. Prior to the arrest, as already stated, one of the murderers, then in the custody of the sheriff, and in his presence and hearing, asserted that plaintiff procured him to commit the crime. But this is not all. The sheriff, upon making inquiry of Mr. Franse and Judge Crawford, both reliable and credible persons, and with whom he was acquainted, had ascertained from them that Pulsifer had made the statement concerning Diers already mentioned, which tended to strengthen his belief in the truthfulness of the information imparted by Shepherd. In making the arrest, Mallon was not prompted to do so by mere idle rumor, but acted in the utmost good faith upon information received from others, upon which he had reason to, and did, rely, and any cautious, prudent person, under the circumstances, would have so acted. We are cor

strained to hold that the officer was not required to make further inquiry regarding the truth of the charge imputed to the plaintiff, and that, under this record, the trial court was fully justified in not submitting to the jury for their determination the question whether the sheriff had reasonable or probable cause for believing that the plaintiff was guilty of the crime of murder.

What we have said disposes of the assignment of error based upon the refusal of the court below to permit plaintiff to prove that the relations existing between him and Pulsifer were the most friendly and confidential, and were so known in the community where they resided. Had this testimony been received, it would not have shown want of probable cause. Mallon was not bound to show that Diers was, in fact, guilty, nor was he required to make inquiries of ¹⁸⁰ his neighbors concerning plaintiff's character and the relations he sustained toward deceased. All that the law demanded of him was, that he act in good faith, upon information of such a character as to raise in his mind a reasonable ground to suspect that the plaintiff was implicated in a felony. This, as we have seen, was fully established upon the trial.

It is argued that the court erred in holding that the plaintiff was detained an unreasonable length of time before he was taken before the county court for examination—in other words, that the question of unreasonable detention should have been submitted to the consideration of the jury. Had the evidence been conflicting upon that branch of the case, then it would have been for the jury to pass upon. But there is not a particle of conflict in the testimony as to the length of time or the circumstances under which the plaintiff was held; therefore, the reasonableness of the detention was a question of law for the court. This is the rule laid down in 2 Thompson on Trials, sections 1559-1561, and is believed to be sound. See *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 553, 90 Am. Dec. 736, where the court, in considering the same question, say: "When the testimony is conflicting and the facts are unsettled, the jury are to decide, under the instructions of the court, as to the law. When there is no dispute as to the facts, the question is purely one of law, and the court should decide it." In view of the facts already detailed, we do not think plaintiff was held an unreasonable length of time, and the court did not err in so deciding. It was Sunday that the arrest was made, and although, as contended by plaintiff, the code confers upon magistrates in criminal proceedings the power to hold an examination upon the first day of the week, they are not required so to do: *Pepper v. Mayes*, 81 Ky. 674. Therefore, Mal-

lon was not derelict of duty in not filing a complaint causing a warrant to be issued, and taking the plaintiff before a magistrate, on the day of the arrest. As ¹⁸¹ stated elsewhere, the sheriff, immediately after arriving with the prisoner in Fremont, and frequently during the following day, called the attention of the prosecuting officer of the county to the matter, detailing to him the facts within his possession, and requested that he prepare a complaint and have a warrant issued, which the prosecutor promised to do. Upon this assurance, Mallon had a right to rely, and was not required to procure another attorney to institute the prosecution. On Tuesday, the complaint was filed, but, by consent of the counsel representing Mr. Diers, the examination was deferred until Thursday. It appears that the attendance of witnesses could not be sooner procured. Plaintiff was given as speedy a hearing as the circumstances would permit, and the court did not err in determining that the detention was not unreasonable.

The eleventh assignment of error is as follows: "The court erred in refusing to give to the jury instructions numbered 1, 2, 3, 4, and 5, as requested by plaintiff." These five requests to charge read thus:

"1. An officer should not receive every idle rumor, but should make such diligent inquiry touching the truth of the charge as the circumstances will permit, before he assumes to arrest upon the information of another.

"2. Mallon had no right to put irons upon plaintiff, unless it was necessary for his safe-keeping, and, if it was not necessary for his safe-keeping, then defendants are liable.

"3. The detention of plaintiff by defendant, without a warrant, under arrest until Tuesday following his arrest, was detaining him an unreasonable time, and renders the defendants liable.

"4. It was the duty of the defendant Mallon, when he arrested plaintiff, to procure a warrant as soon as he reasonably could, and, if he did not so procure a warrant, he is guilty of false imprisonment for such length of time as plaintiff was so held without his consent.

"5. If you find from the evidence that plaintiff was subjected ¹⁸² to treatment unnecessarily severe after his arrest, the defendants are liable for such damages as plaintiff has suffered by reason of such unnecessary severity."

While it is urged the law of the case is correctly set forth in these requests, it is conceded that, if the trial court was right in withholding from the jury the question of probable cause,

and that of the reasonableness or unreasonableness of the detention of plaintiff after his arrest, the first, third, and fourth of these requests were rightly refused. We quite agree with the counsel in this, and, as we have reached the conclusion that both the question of the probable cause for making the arrest and the reasonableness of the detention of the plaintiff were questions of law for the court, and that it properly determined them, it follows that no error was committed in not giving the said first, third, and fourth instructions. The refusing of plaintiff's requests, copied above, having been assigned as error en masse, both in the petition in error and motion for a new trial, and a portion of them having been rightly refused, under a rule established by an unbroken line of decisions, the remaining requests to charge will not be considered by us.

What we have just stated applies with equal force to the twelfth assignment, which is predicated upon the giving of the fourth, fifth, sixth, seventh, and eighth instructions. The giving of these instructions is assigned as error in the motion for a new trial in this language:

"5. The court erred in giving to the jury instructions numbers 4, 5, 6, 7, and 8, and all other instructions excepted to by the plaintiff."

One or more of these instructions, and especially the eighth, on the measure of damages, stated the law applicable to the facts proved; hence, the entire assignment will not be further considered.

Another contention is, that the court erred in not permitting the plaintiff to introduce evidence of his good character. ¹³³ There is some conflict in the decisions as to the competency of evidence to establish the previous good reputation of the plaintiff in an action for false imprisonment, where, as in this case, his general reputation has not been assailed. We shall not, at this time, attempt a review of the authorities. The better rule is, that where no attempt has been made to show the plaintiff's reputation to be bad, he must rely upon the general presumption of good character: *Cochran v. Toher*, 14 Minn. 385; *Fire Assn. v. Fleming*, 78 Ga. 733. This certainly is the correct principle, where, as in the case before us, the defendant did not live in the same neighborhood with the plaintiff, and had but little acquaintance with him prior to the arrest. But it is said that Mallon had abundant time, after receiving the first information implicating plaintiff, and prior to the arrest, to make inquiries of the neighbors of Diers as to his habits, standing, and character, and that he was negligent in failing so to do. We do

not think so. An atrocious crime had been perpetrated, and it was important that the officer should act promptly to prevent a possible escape of the person accused. He was justified in acting upon reliable information in his possession, which was sufficient to raise an honest belief in the mind of a prudent person of the probable guilt of the plaintiff. He was not required to make further investigation to ascertain if the accused was not, in fact, innocent.

It is argued that the verdict is not sustained by sufficient evidence, and is contrary to law. The basis of this contention is the treatment which the plaintiff received at the hands of the sheriff at the time he was taken into custody and during his imprisonment. In *Atwood v. Atwater*, 43 Neb. 147, which was an action for false imprisonment, we had under consideration the liability of a police officer for making an arrest under a warrant, and it was held that, if such officer acts oppressively in the execution of the process placed in his hands, and unnecessarily abuses the person ¹³⁴ arrested, he must answer therefor in damages. The rule is not different where the arrest is made without process. Was the plaintiff treated unnecessarily severe? It is undisputed that the sheriff put handcuffs upon him immediately upon his arrest, but the evidence is conflicting as to the length of time they remained on. The plaintiff's testimony is to the effect that they were not removed until Thursday after he was taken in custody, while the evidence on behalf of the defendants tends to show that the irons were removed for a short period a number of times prior to Tuesday, on which date they were taken off and not put on again, and that plaintiff at the time made no complaint about his treatment. It is also shown that plaintiff's feet were manacled, but here again there is a conflict in the proofs adduced as to how long the fetters were so left upon them. It is argued that there was no necessity for placing the plaintiff in irons, since he offered no resistance, and at no time made any attempt to escape. It is said: "From all that appears to the contrary, the sheriff might have written to the plaintiff, and he would have come in and submitted quietly to arrest, and might have been tied to a tree in the jail yard with woolen yarn, in the safe assurance that he would be found there when he was wanted for examination." This may be true, and yet the sheriff was not at the time aware of it. He did not know that the plaintiff would not attempt to escape. Diers was charged with a heinous crime, which caused considerable excitement and commotion among the people of the county, and the sheriff had been informed that

the plaintiff was a bad man. The evidence bearing upon the sheriff's treatment was submitted to the jury under these instructions:

"While an officer is bound to treat his prisoners with such kindness as may be consistent with security, and will not be warranted in employing any harsh or unnecessary restraint, yet it is his duty to use such reasonable precautions as the case requires to prevent escape, especially in arrest ¹³⁵ for felony or offenses of great magnitude. His action in this regard is to be considered in the light of all facts and circumstances proved by the evidence on the trial of the case bearing upon the question of what means are reasonably necessary to keep the prisoner safe and secure.

"The jury are instructed that, in order to constitute an assault and battery in this case, it is necessary that the jury, from the evidence, find that the defendant Mallon had, at the time and place complained of, unlawfully used force and violence upon the person of the plaintiff in excess of what was reasonable and necessary, under the circumstances, to safely detain and secure the safe-keeping of the plaintiff. If the jury, from the evidence, find there was no excess of force or violence used by the defendant beyond what was sensibly necessary to safely keep the plaintiff, then the defendant would not be liable in this action; but if the jury, from the evidence, believe that the defendant Mallon did use any excess of force or violence beyond what was reasonably necessary to safely keep the plaintiff, then the defendant would be liable to the plaintiff for any injury or damage suffered by the plaintiff by reason alone and rising solely out of the use of such excessive force or violence wantonly or excessively inflicted."

Under these instructions, which are substantially the same as those approved by the supreme court of Michigan in *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266, the jury decided that the sheriff was justified in placing the plaintiff in irons. After a careful consideration of the evidence returned in the bill of exceptions, we are satisfied that it sustains the verdict. The sheriff was not prompted to do as he did through malice or ill-will, but he acted in good faith, believing it was necessary to handcuff the plaintiff to prevent his escape. In the language of Morse, J., in *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266: "Having reasonable cause for making the arrest, the question arises, Was the officer justified in handcuffing the parties? We think the rule laid down by the circuit ¹³⁶ judge a proper one. There must be some discretion reposed in a sheriff, or

other officer, making an arrest for a felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension; and this discretion cannot be passed upon by a court or jury, unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity. It must be found that the officer was unnecessarily rough and inhuman in his treatment of the person arrested, and without any view to prevent the escape of such person. It is not necessary, as claimed by the plaintiff's counsel, that the prisoner must be unruly, or attempt to escape, before he can be handcuffed, or do anything indicating a necessity for such restraint. Nor, in the event that he does nothing at the time of the arrest in the way of attempting to escape, or resisting the officer, is it necessary that he should be a notoriously bad character in order to justify the tying of his hands. There may be other and sufficient reasons, as it seems to me there were in this case, why such extreme measures should be resorted to in order to secure and safely lodge the prisoner. . . . That it turned out afterward that the plaintiff was innocent of any offense, was neither a 'slippery' or desperate character, but an inoffensive and reputable citizen, and that he never had the remotest idea of trying to escape, cannot alter the rule which saves the sheriff harmless from an act which appeared, at the time it was done, to be both necessary and reasonable. The arrest of an innocent man is an indignity hard to be borne, and the tying of his hands with cords or irons is something that makes the blood run chill to contemplate; but both are indignities oftentimes without redress, and a necessary consequence of the due administration of justice in the suppression of crime. An officer is bound to act humanely, and cannot lightly, and without reason, either arrest or harshly treat a supposed offender, be he innocent or guilty. . . . The sheriff cannot stop, ¹⁸⁷ when the man is unknown to him, at the moment of arrest, to inquire into his character, or his intentions as to escape, or his guilt or innocence of the offense charged against him. His duty is to take him, to safely keep him, and to bring his body before a magistrate. If he does this without wantonness or malice, it is not for a jury to find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused, and to punish the sheriff in damages for what honestly appeared to him at the time to be reasonable."

After a careful consideration of the record and the able arguments of counsel, we are convinced that plaintiff has had a fair

and impartial trial, and there being no reversible error committed by the trial court, the judgment is affirmed.

Post, J., not sitting.

ARREST WITHOUT WARRANT.—A peace officer has the right, without warrant, to arrest any person in the night, when he has reasonable ground to believe that such person has committed a felony: *People v. Kilvington*, 104 Cal. 86; 43 Am. St. Rep. 73, and note. An arrest sought to be made by an officer without warrant, for a crime not committed in his presence, and when it is doubtful if any crime has been committed, is an unlawful arrest: *Cryer v. State*, 71 Miss. 467; 42 Am. St. Rep. 473, and note.

ARREST—PROBABLE CAUSE FOR—WHAT AMOUNTS TO.—Probable cause for procuring an arrest is such reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party arrested was guilty: *Rich v. McNerny*, 103 Ala. 345; 49 Am. St. Rep. 32, and note; *People v. Kilvington*, 104 Cal. 86; 43 Am. St. Rep. 73.

ARREST—PROBABLE CAUSE—QUESTION OF LAW.—If a police officer, intending to arrest a person, kills him, the question whether he had probable cause to believe, or reasonable grounds for suspicion, that the deceased had committed a felony, is one of law for the court where the facts are undisputed: *People v. Kilvington*, 104 Cal. 86; 43 Am. St. Rep. 73, and note.

ARREST—TREATMENT OF PRISONER.—An officer, having reasonable cause to believe a person guilty of a felony, may, in arresting, handcuff him; and if this be done without wantonness or malice, the officer cannot be held liable in damages for what, at the time, seemed to him reasonable and right, though it transpires that his precautions were unnecessary in the light of after-acquired knowledge of the true character and intent of the accused: *Firestone v. Rice*, 71 Mich. 377; 15 Am. St. Rep. 166.

AMERICAN WATER WORKS COMPANY v. STATE.

[46 NEBRASKA, 194.]

A DEMURRER DOES NOT ADMIT THE CORRECTNESS OF CONCLUSIONS of law stated in the pleading to which it is interposed.

A WATER COMPANY, HAVING A FRANCHISE TO FURNISH WATER TO A CITY AND ITS INHABITANTS, assumes a public duty, part of which is to furnish water to all such inhabitants at reasonable rates, and not to charge any of them prices not charged to all others for a like service and under similar conditions.

A WATER COMPANY HAS A RIGHT TO PRESCRIBE ALL SUCH RULES AND REGULATIONS for its convenience and security as are reasonable and just, and to refuse to furnish water to any person who declines to comply with them.

THE RULES WHICH A WATER COMPANY MAY PRESCRIBE and enforce must be reasonable, just, lawful, and not discretionary.

WATER COMPANIES.—A RULE REQUIRING THE PAYMENT OF ONE DOLLAR by every person from whose premises water has been turned off for nonpayment of water rates, as a charge for turning the water off and for then turning it on again, is unreason-

able. The company may, by mandamus, be compelled to turn such water on, on the payment or tender to it of the same price at which it would be turned on for a person who had not before used water, and had, therefore, never been in default.

Connell & Ives, for the plaintiff in error.

Charles A. Goss, contra.

¹⁹⁷ RAGAN, C. The state of Nebraska, upon the relation of W. I. Walker, filed an application in the district court of Douglas county, against the American Water Works Company (hereinafter called the "water company"), for a peremptory writ of mandamus to compel the water company to furnish the relator water for use at his residence in the city of Omaha. The relator alleged in his application that the water company was a corporation doing business in the city of Omaha; that it was a common carrier and furnisher of water to the city of Omaha and its inhabitants; that it had secured a franchise from the city, in and by which it had the right to use the streets, alleys, and public grounds thereof for laying its water mains and erecting its hydrants; that it was in the possession and use of the streets and alleys of said city for the purpose of supplying said city and its inhabitants with water; that the relator occupied a dwelling on Davenport street, in said city, near which dwelling the water company had a water main; that the water company had furnished him water at his premises since the 10th of February, 1890, at the rate charged by the water company of eleven dollars per year; that he had always paid his water rents promptly on the first days of January and July in each year, as required by the rules of the company, until the first day of July, 1891; that his water rents were paid up to the last day mentioned; that on said date there became due to the water company five dollars and fifty cents, being the water rents from that date to the first day of January, 1892; that ¹⁹⁸ he was absent from home on the 1st of July, 1891, and remained absent until about the 1st of August of that year; that by reason of the press of business, he forgot, after his return, to pay his water rents until the seventeenth day of August, when the water company shut the water off from his residence; that on the 18th of August, he went to the office of the water company, in the city of Omaha, and tendered it the rent from the first day of July, 1891, to the first day of January, 1892, and requested the water company to turn on the water at his residence, and that the water company refused to do so. The answer of the water company to the relator's application, so far as material here, alleged that the relator

had actual notice of the rules and regulations of the water company; that these rules were reasonable; that they were proper and necessary for carrying on its business and supplying water to its customers, and were enforced against all citizens and customers alike; that among such rules and regulations was the following: "Water rents will be due and payable on the first days of January and July of each year, in advance at the company's office. . . . If not paid within thirty days after they fall due, the water will be turned off and not turned on again until all back rents and charges are paid, including a charge of one dollar for turning the water off and on"; that the relator refused to comply with this rule by paying the sum of one dollar, as required by it for turning the water off and on at his premises, and that relator was insolvent. The relator submitted a demurrer to this answer, which the district court sustained, and issued the writ prayed for.

1. It is insisted that the judgment of the district court is wrong, because the answer alleges, and the demurrer admits, that the charge of one dollar demanded of relator for turning off and on the water was a reasonable charge; that the rule itself was reasonable and proper, and necessary to the carrying on of respondent's business, and that relator was insolvent. But we are of opinion that all these averments ¹⁸⁹ of the answer, except the one as to the insolvency of the relator, are mere conclusions of law. "A demurrer to a pleading admits the truth of the facts well pleaded, for the purpose of determining their sufficiency as a cause of action or defense; but it does not admit the correctness of the conclusions of law therein set out": *Smith v. Henry County*, 15 Iowa, 385; *Branham v. Mayor of San Jose*, 24 Cal. 585.

2. The allegation in the answer that the relator was insolvent, we think, tendered an immaterial issue, as will be seen farther on.

3. The water company, though a private corporation, by virtue of the franchise granted it by the city of Omaha and its user of such franchise, became affected with a public use. By accepting such franchise and entering upon the business of furnishing water to the city and its inhabitants, it assumed a public duty. That duty was to furnish water at reasonable rates to all the inhabitants of the city, and to charge each inhabitant of the city for water furnished the same price it charges every other inhabitant for a like service under the same or similar conditions: *Williams v. Mutual Gas Co.*, 52 Mich. 499; 50 Am. Rep. 266;

Shepard v. Milwaukee Gas Light Co., 6 Wis. 539; 70 Am. Dec. 479. And we have no doubt but that the water company had and has the right to prescribe all such rules and regulations for its convenience and security as are reasonable and just, and to refuse to furnish water to any inhabitant who refuses to comply with such reasonable rules and regulations. But such rules must be reasonable, just, lawful, and not discriminatory: **Shepard v. Milwaukee Gas Light Co.**, 6 Wis. 539; 70 Am. Dec. 479. Is the rule pleaded by the respondent in its answer a reasonable and valid one, with which relator must have complied as a condition precedent to his right to compel respondent to furnish him water? It is to be observed that the rule provides that, if default shall be made in the payment of water rents, the water shall be turned off, and that ²⁰⁰ it will not be again turned on until two things are done: 1. All back rents and charges paid; 2. The payment of one dollar extra for turning off and on the water. As the relator in this case tendered to the respondent the water rents from the 1st of July, 1891, to the 1st of January, 1892, the question whether that part of the rule requiring one in default for water rents to pay such rents as a condition precedent to its right to have the water turned on again, is not necessarily involved in this case. The precise inquiry here is, whether that part of the rule is reasonable which requires one in default for water rents, in order to procure the use of water, to pay this charge or penalty of one dollar. To be valid and enforceable, it must, in itself, be lawful and reasonable and just, and it must not discriminate between persons similarly situated. The reasonableness and validity of the rules of private corporations which had assumed the performance of public duties, or by reason of the acceptance of franchises, and engaging in the business of serving the public by supplying it with water, gas, etc., and had thereby become public service corporations, have been frequently before the courts, but, so far as we know, no court has suggested a test for determining whether or not the rules of such a corporation are reasonable.

In **Tacoma Hotel Co. v. Tacoma Light etc. Co.**, 3 Wash. 316, 28 Am. St. Rep. 35, it is said in the syllabus: "A rule of a water company which requires water rates to be paid quarterly, adds a penalty of five per cent in case of default of payment for ten days, and provides that, after a default for fifteen days, the water shall be shut off from the premises, is a reasonable regulation."

In **Williams v. Mutual Gas Co.**, 52 Mich. 499, 50 Am. Rep. 266, it was held: "The requirement of a deposit of money to

guarantee the payment of the price of the gas used is not an unreasonable one, and the company may discontinue furnishing the gas unless complied with."

In *Shiras v. Ewing*, 48 Kan. 170, it was held that a ²⁰¹ rule of a water company giving it the right to shut off water from the premises of a consumer who wastes it is reasonable.

In *People v. Manhattan Gas Light Co.*, 45 Barb. 136, the right of a gas company to refuse to furnish a customer with gas until he paid his past due gas bills was affirmed.

In *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539, the reasonableness of several rules of the gas company were considered. The ninth rule authorized the company, by its inspector, to have free access at all times to buildings and dwellings, to examine the whole apparatus, and for the removal of the meter and service pipe. The court said: "This regulation is too general, and cannot be upheld, or, at least, a party cannot be required to subscribe to it to entitle him to be furnished with gas." Rule 14 provided that the company should have the right, at any time, to shut off the gas, if it should find it necessary to do so to protect itself from fraud. The court said: "Here the company assume the whole power to decide upon the question of abuse or fraud, either in fact or in anticipation, without notice, without trial, of their own mere motion. This summary jurisdiction would not be given to any of the judicial courts in any case but upon the most urgent emergency. . . . It is no hardship for the company to resort to the same tribunals, upon like process, for protection against fraud, as the law provides for individuals." Rule 16 provided that, after the admission of gas into the fittings, they should not be disconnected or opened, either for alteration or repairs or extensions, without a permit from the company, which might be obtained from the company's office, free of expense, "and any gasfitter, or other person, who may violate this regulation will be held liable to pay treble the amount of damages occasioned thereby." The court said: "It is not to be allowed that the gas company can impose penalties in this way, or make the submission ²⁰² to such penalties a condition precedent to the right of the citizen to be furnished with gas. It is singular, if the legislature has given to the gas company the right to inhibit the citizen from altering the arrangement of his gas apparatus in his dwelling without their assent first had and obtained, or from extending the same; and still more singular that the company should claim the sovereign right to inflict penalties upon him for doing so."

In *Gas Light Co. v. Colliday*, 25 Md. 1, it was held that the gas company could not refuse to furnish gas to a person because he refused to pay a former gas bill, or a bill contracted for gas used on other premises: See *Lloyd v. Washington Gas Light Co.*, 1 Mackey, 331; *New Orleans Gas Light Co. v. Paulding*, 13 Rob. (La.) 378.

In *Sickles v. Manhattan Gas Light Co.*, 64 How. Pr. 33, a dispute arose between the gas company and the consumer, and it was held that the latter was entitled to have his rights investigated by the courts, and that the company would be enjoined from cutting off the gas until a trial of the case could be had.

In *Rockland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368, a rule of the water company provided that users of water should be liable to pay rent for the whole year, whether they actually used it for that length of time or not, and the payments for water should be made yearly in advance. This rule was held to be unreasonable and void.

In *State v. Nebraska Teleph. Co.*, 17 Neb. 126, 52 Am. Rep. 404, during the year 1883, Webster had a telephone in an office, but the telephone company, for some reason, neglected to furnish him a list of its subscribers residing in the city of Lincoln and other cities and villages reached by its telephone lines. When Webster's telephone rent became due, he refused to pay for that part of the time he had used the telephone and during which he had been deprived of the list of subscribers. A dispute arose between Webster and the telephone company, and the company removed its telephone from ²⁰⁸ Webster's office. Some time after that, Webster requested the telephone company to put a telephone in his office, and tendered the company the sum charged its regular subscribers for such work. It does not appear that Webster tendered his telephone rents in advance, nor that the rents were payable in advance, but it appears from the report of the case that Webster was financially able to pay the telephone rents when they matured. The telephone company refused to put in the telephone, alleging that the telephone had been removed from Webster's office by reason of his refusal to pay his rents. Webster then applied to this court for a mandamus to compel the telephone company to furnish him a telephone, and the court awarded the writ. The court said: "It is insisted that the conduct of the relator [the refusal of Webster to pay the rent of the telephone which had been removed from his office] now relieves respondent from any obligation to furnish the telephone, even if such obligation would otherwise ex-

ist. We cannot see that the relations of the parties to each other [growing out of their past transactions] can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone, the law gives it an adequate remedy by an action for the amount due. If the telephone [company] has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits will not alone relieve it from the discharge of those duties. While either, or perhaps both, of the parties may have been in the wrong, so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action." This case is decisive of the question under consideration, and also disposes of the issue of relator's insolvency tendered by the answer of respondent. In *State v. Nebraska Teleph. Co.*, 17 Neb. 126, 52 Am. Rep. 404, respondent refused to furnish a telephone, because ²⁰⁴ it alleged that Webster was indebted to it for the rent of a telephone previously furnished to and used by him, and which had been removed because of his failure to pay the rent. In the case at bar the water company refused to furnish relator water, because it alleged that the relator was indebted to it for having turned off the water from his premises while he was in default in paying his water rent. The cost and expense of turning off and on the water for a patron enters into and forms a part of the semi-annual water rent paid in advance by such patron under the rules of the company. It would be unjust to permit the water company to exact payment for this service a second time. An enforcement of the rule would compel a citizen who had once made a default in his water rent, though he afterward paid all such rents, to pay a greater price or rate for water than that paid by another citizen for the same water under the same conditions. We reach the conclusion that the respondent in this case has shown no sufficient excuse for not furnishing the relator with water; and that the rule invoked by it to stay the process of the courts is unreasonable and discriminatory in its nature, and therefore void.

The judgment of the district court is affirmed.

Irvine, C., not sitting.

PLEADING.—A GENERAL DEMURRER DOES NOT ADMIT MERE CONCLUSIONS OF LAW: *Peake v. Buell*, 90 Wis. 508; 48 Am St. Rep. 946, and note.

WATER COMPANIES—REASONABLE REGULATIONS.—A rule of a corporation holding a franchise of the right to supply a city and its inhabitants with water, which provides that upon the nonpayment, within a reasonable time, of the amount due by a party for water furnished him, the corporation may deprive him of the further use of its water by shutting off the supply until payment of the amount due, is reasonable and binding, as against a party furnished with water under a contract with actual notice of the rule, and its enforcement will not be enjoined: *Tacoma Hotel Co. v. Tacoma Land etc. Co.*, 3 Wash. 316; 28 Am. St. Rep. 35, and note. See, also, *Rockland Water Co. v. Adams*, 84 Me. 472; 30 Am. St. Rep. 368.

GAS COMPANIES—DUTY TO FURNISH GAS.—A gas company is bound to supply with gas all individuals requiring it, on payment or reasonable security: *Williams v. Mutual Gas Co.*, 52 Mich. 499; 50 Am. Rep. 266; *Shepard v. Milwaukee Gas etc. Co.*, 6 Wis. 539; 70 Am. Dec. 479, and extended note. That a gas company, in the absence of anything to the contrary in the charter, may choose its own customers is maintained in *Patterson Gas etc. Co. v. Brady*, 27 N. J. L. 245, 72 Am. Dec. 360, and *McCune v. Norwich City Gas Co.*, 30 Conn. 521; 79 Am. Dec. 278.

MCGINN v. STATE.

[46 NEBRASKA, 427.]

THE TERM "MONTH," at common law, meant a lunar month of twenty-eight days, except in ecclesiastical affairs, and as applied to commercial paper; but, in this country, it is understood to mean a calendar month.

A CALENDAR MONTH IS TO BE COMPUTED, not by counting days, but by looking at the calendar. It terminates with the day numerically corresponding to the day of its commencement, less one in the following month. Thus, if a term of three calendar months begins with the ninth day of April, it ends at midnight on the eighth day of July.

TIME WHEN STATUTES GO INTO EFFECT.—If a constitution declares that no act shall take effect until three calendar months after the adjournment of the session at which it is passed, a statute enacted on the ninth day of April becomes a law at the first moment of the ninth day of July. This remains true, though another statute declares that the time within which an act is to be done shall be computed by excluding the first day and including the last.

FORMER JEOPARDY.—One who procures a reversal of a judgment of conviction waives his right of objection to a second trial, on the ground that he has been once in jeopardy.

CRIMINAL LAW—PRONOUNCING SECOND SENTENCE.—If a person convicted of murder is sentenced to be executed at a day designated, and, in the mean time, to remain in solitary confinement, he may, at a subsequent day, be again brought before the court, and sentenced to be executed at a later day, if the first sentence was, for some cause, irregular. Though the prisoner has suffered part of the solitary confinement, it is not a part of the sentence, but a means adopted to make more certain that he may be produced at the time fixed for his execution.

Mahoney, Minahan & Smyth, and Estelle & Hoeppner, for the plaintiff in error.

⁴³⁴ POST, J. The plaintiff in error, Barney McGinn, was, at the September, 1893, term of the district court for Douglas county, adjudged guilty of the crime of murder in the first degree, which judgment has been removed into this court for review by means of a petition in error, to which further reference will hereafter be made. The prisoner is, by the information, charged with feloniously and maliciously wounding, with intent to kill, one Edward McKenna on the twenty-ninth day of July, 1893, from which he, the said McKenna, died two days later, on the thirty-first day of July. It is unnecessary to examine at length the evidence adduced in support of the allegations of the information. It is sufficient for the purpose of this investigation that the dates of the assault and the death of the deceased were proved as charged by the state. The jury, at the close of the trial, returned a general verdict of murder in the first degree, without assessing the penalty therefor, to which exception was taken, both by way of motion for a new trial and in arrest of judgment, and which suggests the first questions presented for our consideration.

Prior to the act approved April 8, 1893, entitled "An ⁴³⁵ act to amend section No. three (3) of the Criminal Code," etc. (Sess. Laws 1893, c. 44, p. 385), the only penalty for murder in the first degree was death by hanging; but, by section 1 of the act above mentioned, section 3 of the Criminal Code was so amended as to read thus: "And, upon conviction thereof, shall suffer death, or shall be imprisoned in the penitentiary during life, in the discretion of the jury." By section 2 of said act, the original section is repealed, with a saving clause in the following language: "Provided, however, that such repeal shall not be construed to apply to any offenses committed prior to the taking effect of this act, nor shall the same affect any convictions or prosecutions held under said original section": Sess. Laws 1893, c. 44, sec. 2, p. 386. The contention of counsel for the prisoner is, that the act of 1893 took effect previous to the date charged in the information; hence the district court should have required the jury to fix the penalty, and that it accordingly erred in receiving the verdict over their objections. The constitutional provision which bears upon the subject is found in section 24 of article 3, as follows: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless, in case of emergency, to be expressed in the preamble or body of the act, the legislature shall, by a vote of two-thirds of all the members elected to each house,

otherwise direct." The twenty-third session of the legislature adjourned on the day the act in question was approved, to wit, April 8, 1893; therefore, the precise question presented is, When did the constitutional period of three calendar months after the adjournment of that session terminate? The term "month," at common law, whether employed in statutes or contracts, unless a different meaning was apparent from the context, was held to mean a lunar month of twenty-eight days, except in ecclesiastical affairs, and as applicable to commercial paper: Chase's Blackstone's Commentaries, *141; Bishop on ⁴³⁶ Contracts, sec. 1339; Migotti v. Colvill, L. R. 4 C. P. Div. 233; Lacon v. Hooper, 6 Term Rep. 224; Churchill v. Merchants' Bank, 19 Pick. 532; Guaranty etc. Co. v. Green Cove etc. Ry. Co., 139 U. S. 137. In this country, many of the earlier cases follow the rule of the common law: See, also, Ellis' case, 8 N. J. L. 286; Loring v. Halling, 15 Johns. 119; Stackhouse v. Halsey, 3 Johns. Ch. 74; Redmond v. Glover, Dud. (Ga.) 107. Later cases have, as a rule, construed the word "month," when it does not appear to have been used in a different sense, to mean a calendar month: Glore v. Hare, 4 Neb. 132; Brown v. Williams, 34 Neb. 376, and cases cited. In order to avoid the confusion arising from conflicting instructions of the term, thirty-five states and territories have, by legislative enactment, declared the term "month," when used without qualification, to mean a calendar month; and in England the common-law rule was abolished by statute in 1850: 13 & 14 Vict., c. 21.

It is said by counsel for the prisoner, referring to the facts of this case, that "the authorities, without exception, support our contention, that three calendar months should be computed as commencing to run on the ninth day of April and terminating on the eighth day of July," and, as that proposition presents the issue to be determined, we will proceed to examine some of the cases cited as bearing upon the subject. In Glore v. Hare, 4 Neb. 132, it was held that an appeal taken on the twenty-second day of August from a judgment rendered February 21st is not within the six months prescribed by the act governing appeals to this court. In Brown v. Williams, 34 Neb. 376, a note executed on the second day of January was held within the exception contained in section 44 (Comp. Stats., c. 6) of the assignment law, being a debt created within nine calendar months previous to a general assignment made on the second day of October following. In Snyder v. Warren, 2 Cow. 518, 14 Am. Dec. 519, fifteen ⁴³⁷ calendar months were computed from Au-

gust 15, 1822, to November 15, 1823. In *McGuire v. Ulrich*, 2 Abb. Pr. 28, the statute required one month's notice to quit before suit brought. The notice was given April 18th, and it was held that a calendar month had intervened before the commencement of the action, to wit, May 25th. In *Guaranty etc. Co. v. Green Cove etc. Ry. Co.*, 139 U. S. 137, the first publication of notice was made August 9th, the answer day named being December 1st, following. After computing the time at one hundred and fourteen days, the court say the time is "more than four lunar months, but eight days less than four calendar months."

We now come to a class of cases having a more direct bearing upon the question at issue. In *Commonwealth v. Maxwell*, 27 Pa. St. 444, the statute provided that, in case of vacancy in the office of judge of common pleas, a successor should be chosen "at the first general election which shall happen more than three calendar months after the vacancy shall occur." The presiding judge died July 15, 1856, and the general election for that year occurred October 14th. It was held that the statutory period had not intervened, and that the respondent, who was chosen at the election held on the day last mentioned, was not entitled to the office. In *Minard v. Burtis*, 83 Wis. 267, we observe this language: "It is also said that the notice was not given one calendar month before the action was commenced; that, having been given April 4th, it would not be complete until June 1st. We cannot adopt this view. If given the proper number of days before action brought, as contained in the calendar month in which it was given, as in this case, it was sufficient." The leading case of *Lester v. Garland*, 15 Ves. Ch. 248, arose under the will of Sir John Lester, providing that the testator's sister, Sarah Pointer, should, within six calendar months after his death, give security that she would not at any time intermarry with A, or that in case she did so intermarry, ⁴⁸⁹ that she would, within six calendar months thereafter, pay certain bequests therein made. The testator died January 12th, and the security given July 12th was held to satisfy the requirements of the will, Grant, M. R., saying: "The question is, whether the day of Sir John Lester's death is to be included in the six months or to be excluded. If the day is included, she did not, if it is excluded, she did, give the required security before the end of the last day of the six months, and therefore did comply sufficiently with the conditions." *Hardy v. Ryle*, 9 Barn. & C. 603, was an action against a justice of the peace for

illegally detaining the plaintiff after the expiration of his term of imprisonment. The defendant relied upon a statute of limitations which required the action to be brought "within six calendar months after the act committed." The court, after a review of the authorities, say: "The question depends upon this: whether the fourteenth day of December, the last day of the plaintiff's imprisonment, is to be included or excluded. . . . If it is to be included, the action was not commenced in time; if it is to be excluded, it was." *South Stratfordshire Tramway Co. v. Sickness etc. Assur. Assn.*, 1 Q. B. Div. 402, was an action on a policy of insurance for twelve calendar months, from November 24, 1888. It is said that November 25, 1887, was the first, and November 24, 1888, the last, day covered by the policy. And to the same effect are *Young v. Higgon*, 6 Mees. & W. 49; *Watson v. Pears*, 2 Camp. 294; *Ratcliffe v. Bartholomew*, 1 Q. B. Div. 161; *Gross v. Fowler*, 21 Cal. 393; *Savings etc. Soc. v. Thompson*, 32 Cal. 347. But perhaps the most satisfactory of reported cases is *Migotti v. Colvill*, L. R. 4 C. P. Div. 233, which was an action against the governor of the Middlesex House of Correction, for false imprisonment. It appears that the plaintiff was, on the thirty-first day of October, sentenced to imprisonment for the period of one calendar ⁴³⁰ month, and to the further term of fourteen days, to commence on the expiration of the first sentence. The decision turned upon the question when the first sentence terminated, and Lord Denman, after an exhaustive examination of the subject, concludes as follows: "On the whole, I am of opinion that a sentence of imprisonment for one calendar month, passed on any given day of any given month, is to be held to begin to run from the first moment of that day, and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day, by reason of the succeeding month not having so many days as in the preceding month, then, by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its last day." The other judges, Cotton, Bramwell, and Brett, concur in separate opinions, the latter using the following language: "I am of opinion that the term a 'calendar month' is a legal and technical term, and that we are bound to interpret its legal and technical meaning. The meaning of the phrase is, that in computing time by calendar months, the time must be reckoned by looking at the calendar, and not by counting days, and that one calendar

month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month, less one." It is true the precise question was not presented in every case cited, as the same result would, in some instances, have been reached by extending the period to the end of the month; but they are, nevertheless, instructive, as tending to sustain the assertion of counsel that, in no case, except in *Minard v. Burtis*, 82 Wis. 267, was the rule applied by the district court contended for. The natural and necessary deduction from the authorities above cited is, that the term "calendar month," as used in the constitution, had, prior to the adoption of that instrument in 1875, received a definite interpretation, and is to be computed ⁴⁴⁰ not by counting days, but by looking at the calendar, and terminates with the day numerically corresponding to the day of its commencement, less one, in the following month; and such is evidently the sense in which it is employed in the constitution.

The authorities are not, as will be observed, harmonious upon the question whether the first day—in this instance, the day of the adjournment of the legislature—is to be included in the prescribed period. That question is, however, not an open one in this state. Indeed, it is clear that section 895 of the Code of Civil Procedure, providing that "the time within which an act is to be done as herein provided shall be computed by excluding the first day and including the last," was intended to establish a uniform rule, applicable to the construction of statutes as well as to matters of practice: *Monell v. Terwilliger*, 8 Neb. 360; *McGavock v. Pollack*, 13 Neb. 535; *Spencer v. Haug*, 45 Minn. 231. It follows that the period of three calendar months after the adjournment of the legislature of 1893 terminated at midnight of the eighth day of July of that year. It follows, too, that the act amendatory of the Criminal Code, relating to the penalty for murder in the first degree, was the law of the state on the twenty-ninth day of July, and should have governed in the trial of this cause. The attorney general, however, relies upon a practical construction of the provision under consideration adverse to the view above stated. This contention has for its basis the opinion of Hon. George H. Hastings, attorney general, in response to an inquiry addressed to him by the secretary of state on the twenty-ninth day of April, 1891. We have examined with care the opinion referred to, but are unable to accept the conclusion of the learned author, for reasons already appearing. A practical exposition of a constitu-

tional provision by the officers charged with its execution is, as said by us in *State v. Holcomb*, 46 Neb. 88, entitled to great weight, and will, in case of doubt or ambiguity, ⁴⁴¹ especially when long acquiesced in, generally be adopted by the courts; but that rule can have no application to the case at bar. There is not alone an absence of evidence tending to prove that the construction of the attorney general was acquiesced in by the executive officers or the people of the state, but it is a fact, verified by the records of this court and of which we are required to take notice, that the question has, ever since the date of the opinion mentioned, been the subject of judicial controversy.

Of the many questions presented during the able and instructive arguments with which we have been favored in this case, it is necessary to notice two only in addition to those already examined, and which are both included in the proposition that it is our duty to discharge the plaintiff in error, instead of remanding the cause for trial de novo. It is asserted by counsel that the plaintiff has been once in jeopardy, within the meaning of the bill of rights, and that the trial then had is a bar to further prosecution for the crime charged. If the question were an open one, to be determined by the application of fundamental principles, the argument of counsel could not be lightly disregarded. Indeed, we can conceive of no course of reasoning which does not lead logically to the conclusion contended for. As said by Mr. Bishop (1 Bishop's Criminal Law, 1044): "The court is the power that brings the jeopardy upon him [the prisoner], and when the constitution declares that this power shall not put him in jeopardy twice, it is mockery to say that it may bring him into as many jeopardies as it will, provided it violates the law each time." But the author, at sections 998 and 999 of the same volume, admits the contrary to be the firmly established rule. To attempt an examination of the cases holding that the accused, in a criminal prosecution, by procuring a reversal of the judgment of conviction, waives his right to object to a second trial on the ground that he has been once put in jeopardy, would be a work of supererogation. It is sufficient that ⁴⁴² the question has been definitely determined by this court in *Bohanan v. State*, 18 Neb. 57; 53 Am. Rep. 791. See, also, *United States v. Harman*, 68 Fed. Rep. 472.

The other contention, that the prisoner should be discharged, is based upon the following facts: On the twenty-ninth day of December, 1893, the district court, on overruling the motion for a new trial, pronounced its judgment, by which the prisoner

was to be executed on the sixth day of April following, and in the mean time remain in solitary confinement in the jail of Douglas county. On the next day, to wit, December 30th, he was again brought into court, and an order made setting aside the judgment previously entered, and a second sentence pronounced, by which April 13, 1894, was named as the day of execution. The second sentence, like the first, provided that the prisoner should, from the date thereof until the day of his execution, be confined in the jail of Douglas county. It is argued that the second sentence is not irregular merely, but absolutely void, for the reason that the punishment prescribed by the first had been suffered in part by the prisoner, and the power of the court over the subject thereby exhausted. In the brief of counsel for the prisoner, his position is thus tersely stated: "The solitary confinement imposed upon the prisoner was as much a part of his sentence as was his execution. The only authority that the sheriff had to imprison him during that day and until called into court the following day was the sentence pronounced on the 29th of December. All previous commitments had expired. Their purpose had been served. The judgment and sentence of the court were the only authority upon which the imprisonment could be legally justified from the 29th to the 30th of December, and the imprisonment of plaintiff in error under that sentence from the 29th to the 30th of December, was the infliction of a part of the punishment covered by the sentence, and a part, too, that the court had legal authority to impose." That argument, although plausible, is ⁴⁴³ not convincing. The first sentence was, it is conceded, irregular, the time intervening between the date thereof and the day of execution being less than one hundred days, as prescribed by law: Crim. Code, sec. 503; but having reached the conclusion that the verdict was also irregular, and should have been set aside on the motion of the prisoner, the power of the district court to correct its judgments in prosecutions for felonies will not now be examined.

This court in *In re Fuller*, 34 Neb. 581, held that the term of imprisonment of one sentenced to the penitentiary runs from the date of sentence and not from the date of his delivery to the warden; but that was a construction of section 518 of the Criminal Code, and not involving the question now under consideration. It is, by section 547, provided, in substance, that the death penalty shall be inflicted in the immediate vicinity of the jail in an inclosure to be prepared under the direction of the sheriff. Although the confinement of the prisoner from the time of sen-

tence until the day of his execution is a practice which has prevailed from time immemorial as a necessary incident to the judgment, it is, strictly speaking, no part thereof, and the power of the court in that regard does not rest upon any positive provision of statute. The precise question appears to have been seldom raised, and the cases cited cannot be said to sustain the proposition contended for. In *People v. Meservey*, 76 Mich. 223, as well as in *People v. Kelley*, 79 Mich. 320, the sentence was imprisonment in the penitentiary, and, in accordance with the rule adopted by this court in *In re Fuller*, 34 Neb. 581, was held to have commenced on the day it was imposed. In *In re Tyson*, 13 Col. 482, the statute of 1889 provided that all persons convicted of crimes punishable by death should be delivered to the warden of the penitentiary, and by him kept in solitary confinement until the day of execution. The statute in force at the time of the homicide, like ours, provided merely that every person convicted of murder in the first degree should suffer death. *Tyson*,⁴⁴⁴ having been convicted of murder in the first degree, was delivered to the warden, under the act of 1889, whereupon he sought his discharge by means of a writ of habeas corpus, alleging that the provision for solitary confinement was in the nature of an *ex post facto* law. In disposing of that contention, the court say: "Aside from this, the defendant is imprisoned for the purpose only that he may be produced at the time set for his execution, the confinement being no part of the punishment, but simply an incident connected therewith, referable to penal administration as its primary object." The same statute was before the supreme court of the United States in *Medley*, *Petitioner*, 134 U. S. 160, where it was held, but without controverting the proposition that the imprisonment is not a part of the sentence proper, that the provision therein for solitary confinement was in the nature of an *ex post facto* law, as to crimes previously committed. We are satisfied with the reasoning of the Colorado court, and do not hesitate to adopt the conclusion reached by it, so far as applicable to the facts of the case before us.

Although it has been our endeavor to examine the merits of the question presented, we must not be understood as conceding it to be an open one at this time. We have, on the other hand, no reason to doubt the soundness of the practice, long prevailing in this state, by which one committed to the penitentiary is, by procuring a reversal of the judgment of conviction, considered to have waived his right to insist that the partial execution of the

sentence is a bar to further prosecution; and such, while not expressly decided, logically follows from the rule asserted in *Bohanan v. State*, 18 Neb. 57; 53 Am. Rep. 791.

The judgment is reversed, and the cause remanded for further proceedings by the district court.

TIME—MEANING OF TERM “MONTH.”—In statutes and judicial proceedings, the word “month” means a calendar month, and it should be so construed in contracts, unless it appears that the parties intended a lunar month: *Williamson v. Farrow*, 1 Bail. 611; 21 Am. Dec. 492. In cases of bills of exchange and promissory notes, time is calculated by calendar, and not by lunar, months: *Leffingwell v. White*, 1 Johns. Cas. 99; 1 Am. Dec. 97. The word “month” and the words “thirty days” are synonymous terms in the general railroad law of Indiana: *Heaston v. Cincinnati etc. R. R. Co.*, 16 Ind. 275; 79 Am. Dec. 430.

CRIMINAL LAW—TWICE IN JEOPARDY.—Resentencing a prisoner on the same verdict is not putting him twice in jeopardy for the same offense: *McDonald v. State*, 79 Wis. 651; 24 Am. St. Rep. 740.

FORMER JEOPARDY—REVERSAL ON APPEAL.—Where a conviction and judgment are set aside on proceedings instituted by a prisoner on the ground that he has been deprived of a public trial, the plea of former jeopardy cannot avail to prevent a second trial: *People v. Murray*, 89 Mich. 276; 28 Am. St. Rep. 294. An accused waives the right to claim former jeopardy, when he makes a motion which substantially amounts to vacating a former judgment against him, and the court sets aside such judgment, notwithstanding the court, in addition to what is asked, does, of its own motion, award a new trial: *Sterling v. State*, 25 Tex. App. 716; 8 Am. St. Rep. 452. An accused is not put twice in jeopardy by having his case remanded for a new trial on account of errors occurring at the trial: Note to *McDonald v. State*, 24 Am. St. Rep. 742.

STATE v. MOORE.

[46 NEBRASKA, 590.]

ANTEDATING MUNICIPAL BONDS to a time anterior to the election which authorized their issue is not such an irregularity as affects their validity, if the object is not to evade the operation of any law, and the result cannot impose a greater or different liability than that sanctioned by the election and other proceedings taken for the issuing of the bonds.

C. C. Flansburg, for the relators.

A. S. Churchill, attorney general, and W. S. Summers, deputy attorney general, contra.

590 IRVINE, C. This was an original application, by the county commissioners of Boyd county, for a writ of mandamus to compel the respondent, as auditor of public accounts, to register certain bonds of Boyd county. In brief, the application for the writ discloses that on the 10th of January, 1895, the relators, as county commissioners, found and determined that the indebt-

edness of Boyd county, evidenced by ⁵⁹¹ judgments, warrants, and claims, was twenty thousand dollars, and less than ten per cent of the assessed valuation of the county; that thereupon they ordered a special election to be held on the nineteenth day of February for the purpose of voting on the proposition of issuing bonds in the sum of twenty thousand dollars, for the purpose of funding such indebtedness; that the proposition submitted was for the issue of bonds in the sum of twenty thousand dollars, to be dated January 2, 1895, to draw interest at the rate of six per cent per annum, payable semi-annually, on the second day of July and the second day of January of each year, until said bonds should be paid, said bonds to run twenty years from the date thereof; provided, however, that they might be made redeemable at the option of the county board at any time after ten years from the date thereof. The proposition also provided for the place of payment and for sale at not less than par and for the levy of a tax to pay the bonds. It is further alleged that due notice of the election was given, the election held and canvassed, and said proposition found to have been carried; that on "the — day of April, 1895," the bonds, having been prepared and executed in all respects in accordance with the proposition, were presented for registration and registration refused. To this application the respondent demurred. The only question argued in support of the demurrer was that arising from the fact that the bonds bore date January 2, 1895, while the election was not ordered until January 10th, or held until February 19th, and the bonds not in fact issued in April, when offered for registration. The statute authorizes such funding bonds to be issued after an election authorizing the same, "to run not more than twenty years nor less than five years, with interest at a rate not to exceed seven per cent per annum, payable semi-annually; . . . provided, that such bonds may be made redeemable at any time after five years, at the option of the county board": Comp. Stats., art. 1, c. 18, sec. 133. It is also provided that, whenever a bond of any county ⁵⁹² shall be presented to the auditor for registration, the auditor shall detach as many interest coupons as shall mature before the first taxes levied to meet the same shall become due and collectible: Comp. Stats., c. 9, sec. 37. We think that in this case the antedating of the bonds in nowise affects their validity or regularity. If the effect of such antedating were to evade the operation of any law, the case would be different. Thus, if to antedate the bonds were, in effect, to provide a higher rate of interest than permitted by law or author-

ized by the voters, this would be a substantial defect, but the statute last cited, requiring the detaching of coupons, would render it impossible for any claim for interest to accrue prior to their actual registration. So, if the effect of antedating were to make the bonds mature, or to make them redeemable, in a shorter period than the law permits, this, too, would be a substantial defect. But the bonds might, under the statute, be made to mature in any time from five to twenty years. The proposition contemplated the antedating, and the bonds issued in conformity thereto would, therefore, mature within the statutory period. They might be made redeemable in any time, not less than five years. Under the proposition, they were made redeemable in ten, so that the period of redemption was within the statute. The antedating of the bonds in nowise rendered them in conflict with the statute, or the proposition submitted to the electors, and was in no sense a matter of substance. The case must be distinguished from such cases as *Wood v. City of Louisiana*, 5 Dill. 122, *City of Louisiana v. Wood*, 102 U. S. 294, and *Anthony v. Jasper County*, 101 U. S. 693, where the antedating was for the purpose of evading the registration law, which went into operation between the date of the bonds and the time of their issue; and also from such cases as *Coler v. Cleburne*, 131 U. S. 162, where the bonds were antedated and signed by the person who was mayor at the day of their date, but not mayor at the time of their actual ⁵⁹³ execution. The case is more analogous to *Flagg v. Mayor of Palmyra*, 33 Mo. 440; *Commissioners of Marion County v. Clark*, 94 U. S. 278; *Township of Rock Creek v. Strong*, 96 U. S. 271; *Dows v. Elmwood*, 34 Fed. Rep. 114. In *Flagg v. Mayor of Palmyra*, 33 Mo. 440, the bonds in question were aid bonds, and were dated prior to the passage of the ordinance subscribing for the stock purchased with the bonds. In this case, it is said: "This is the most plausible objection to the bond, but it is only plausible. The bond complies literally with the law, in being payable twenty years after date, and bearing eight per cent interest. The objection must then be, that notwithstanding the literal compliance with the law, this is a substantial departure from the manifest intention. It does not appear to be so." In *Commissioners of Marion County v. Clark*, 94 U. S. 278, the bonds were dated September 3, 1872, but not issued until November 4th following. The bonds ran thirty years, and the court held that this time should be computed in that case from the time the bonds were actually executed and delivered, apparently applying a statute of Kansas to that effect. Under

this rule, the bonds would not exceed the lawful limit, and they were held valid. In *Township of Rock Creek v. Strong*, 96 U. S. 271, the bonds were dated September 10, 1872, payable thirty years from October 15, 1872. The court held that their legal effect was precisely what it would have been had the date been inserted October 15th, and that the defect was not substantial. *Dows v. Elmwood*, 34 Fed. Rep. 114. is to the same effect. All these cases support the principle upon which we base the decision, to wit, that such an irregularity as the present does not affect the validity of the issue, where it does not affect the substance of the transaction by operating an evasion of the law or a departure from the proposition ratified by the voters.

Writ allowed.

MUNICIPAL BONDS—IRREGULARITIES IN.—Where county bonds are, by special act of the legislature, authorized to be issued upon a popular vote, "specifying the amount," and they are issued upon a popular vote which failed to "specify the amount," this circumstance will be deemed an irregularity merely, and not sufficient to render the bonds void in the hands of bona fide holders: *Note to State v. Commissioners*, 7 Am. St. Rep. 570. See the discussion of this subject in the extended note to *De Voss v. Richmond*, 98 Am. Dec. 680.

JOHNSON v. GULICK.

[46 NEBRASKA, 817.]

EVIDENCE OF OTHER TRANSACTIONS than those in issue in an action, is admissible only for the purpose of proving the scienter, when it is an issue in the cause.

IN AN ACTION FOR FALSE REPRESENTATIONS, it is not necessary to allege or prove a scienter. Therefore, evidence of other false representations made by the defendant respecting the same matter, at or about the same time, but to another person than the plaintiff, is not admissible.

Ricketts & Wilson, for the plaintiff in error.

818 NORVAL, J. Plaintiff in error brought suit in the court below upon a promissory note for \$1,296, purporting to be made by the defendants in error, bearing date January 1, 1891, and payable April 1st thereafter, with interest at eight per cent. The defendants, for answer, admit the execution and delivery of the note, but aver that it was given in renewal of a note of \$1,200, executed by the defendants as part consideration of three-fifths of the corporate stock in the Commercial Publishing Company, of Ogden, Utah; that plaintiff, in order to induce the defendant to make said purchase, knowingly and falsely represented

them that said corporation was the owner of a franchise in the Western Associated Press of the value of \$4,000; that the defendants relied upon said representations; that the same were false and untrue; and that the defendants have been thereby damaged in the sum of \$2,000. The reply was a general denial of each averment of new matter contained in the answer. There was a jury trial, resulting in a finding that there was due the plaintiff from the defendants, upon the note declared upon, the sum of \$1,425.60, and that there was due the defendants, upon the counterclaim, the sum of \$1,389, and the amount of the plaintiff's recovery was assessed at the difference between said amounts, to wit, \$36.60. ^{§19} Judgment was rendered in accordance with the verdict, and plaintiff brings error.

Thirty-six errors have been assigned, while but one has been argued in the brief of plaintiff. It relates to the rulings of the trial court upon the admission of testimony. All other errors assigned are regarded as waived, and will not be considered by the reviewing court: *Gulick v. Webb*, 41 Neb. 706; 43 Am. St. Rep. 720.

Upon the trial, evidence was introduced tending to establish the allegations of the counterclaim set up in the answer. The defendants, in making out their case, produced and read the deposition of one J. S. Painter, who, after testifying that he and one Murphy, the last of November or the first of December, 1889, which was prior to the sale of the stock to the defendants, purchased of the plaintiff Johnson six-tenths interest in the Ogden Daily Commercial, deposed in answer to questions as follows:

Q. State whether or not at the time, while negotiations were pending between yourself and Murphy, as parties of one part, and the plaintiff Johnson, as party of another part, for the purchase and sale of this stock, any statements or representations were made to you by the plaintiff Johnson concerning the Western Associated Press franchise possessed or owned by the Ogden Daily Commercial. A. Yes, sir; there were such representations made. I had a number of conversations with Mr. Johnson in regard to the purchase of the paper. I do not remember just exactly when the first one was had. The second one was had about November 20, 1889. I went into the office and looked it over. Mr. Johnson was not in. I returned to the local editorial room. We went into the editor in chief's room, and had a talk about the paper.

Q. What I want to get at is any conversation between yourself and Mr. Johnson about the franchise. A. I told him I

thought I could duplicate good material in the office for \$2,000, and he says the franchise was exclusive ^{§20} and was worth \$10,000, and that if he was circumstanced differently than he was at that time, he would not take less than \$25,000; that it would be worth that in two years.

Q. What exclusive franchise did he refer to? A. Associated Press franchise.

Q. As being owned and possessed by the Ogden Daily Commercial? A. He said so.

Q. Was the representation as to the paper owning and possessing the Associated Press franchise made to you more than once by Mr. Johnson? A. It was made to me on two or three occasions. Every time we talked about the matter it was discussed, because I looked upon it, from what he said, as being the most valuable part of the paper.

Each question was objected to at the time the same was propounded, as being incompetent, irrelevant, and immaterial, and an exception was duly taken to the overruling of the objection. The assignment argued by plaintiff is based upon the admission of the testimony quoted above. He now insists that the objection to receiving the evidence should have been sustained, because proof of representations made by the plaintiff to persons other than the defendants does not tend to establish that the representations charged in the answer were made as therein stated. We think this position sound. The evidence was clearly inadmissible, and had the effect to mislead the jury. From the fact that the plaintiff made the representations to Painter testified to by him, the inference cannot be properly drawn that the same or similar representations were made by plaintiff to the defendants. As is stated in 1 Phillips on Evidence, *748: "It is considered, in general, that no reasonable presumption can be formed as the making or executing of a contract by a party with one person, in consequence of the mode in which he has made or executed similar contracts ^{§21} with other persons. Still less can a party be affected by the declarations, conduct, or dealings of strangers. Transactions which fall within either of these classes are termed in law *res inter alios acta*, and evidence of this description is uniformly rejected. Where the question between a landlord and his tenant is, whether the rent was payable quarterly or half-yearly, it has been held irrelevant to consider what agreements subsisted between the landlord and other tenants, or at what time their rents would become due:"

1 Greenleaf on Evidence, sec. 53; 1 Wharton on Evidence, sec.

29. In *Somes v. Skinner*, 16 Mass. 360, it is said: "It is not competent to a party, imputing fraud to another, to offer evidence to prove that the other has dealt fraudulently at other times, and in transactions wholly disconnected with that which is on trial." Evidence of other transactions than those under investigation is admissible, but only for the purpose of proving the scienter or intent, when that is in issue in the case. The defendants have failed to furnish us either with a brief or oral argument in this case; hence, we are not advised of the theory upon which they introduced the evidence. Possibly, it was offered and admitted upon the ground that it was essential for the defendants to establish the scienter; that is, that the plaintiff, at the time of making the representations, knew them to be false. Whether, in an action for damages for false representations, it is necessary either to aver or prove the scienter, the authorities do not agree. The better rule, and the one adopted by this court, is, that the intent or good faith of the person making false statements is not in issue in such a case (*Philips v. Jones*, 12 Neb. 213; *Foley v. Holtry*, 43 Neb. 133; *Carter v. Glass*, 44 Mich. 154; 38 Am. Rep. 240; *Shippen v. Bowen*, 122 U. S. 575), and the trial court so instructed the jury in the case at bar. It is true the answer sets up that the plaintiff knowingly made false representations, but as it was unnecessary to aver the fraudulent intent, the defendants were not called upon to prove ⁸²² it. It follows that the evidence introduced to show that the plaintiff made similar misstatements to persons other than the defendants in the sale to them of a portion of the same series of stock in the Commercial Publishing Company as that sold to defendants, was incompetent and immaterial.

For the error pointed out, the judgment is reversed and the cause remanded.

EVIDENCE OF OTHER FRAUDULENT TRANSACTIONS.—If an act is claimed to be fraudulent, evidence of other similar fraudulent acts is admissible, if they were committed at or about the same time, and the same motive may reasonably be supposed to exist for all of them: *McCosker v. Enright*, 64 Vt. 488; 33 Am. St. Rep. 938, and note. Acts which are part of one general scheme or plan of fraud, designed or put in execution by the same person, are admissible to prove that an act which has been done by someone was, in fact, done by the person who designed and pursued the plan, if the act in question was a necessary part of the plan: *Fowle v. Child*, 164 Mass. 210; 49 Am. St. Rep. 451. See, also, *Miller v. Curtis*, 158 Mass. 127; 35 Am. St. Rep. 400.

CASES
IN THE
SUPREME COURT
OF
NORTH DAKOTA.

ROBY v. BISMARCK NATIONAL BANK

[4 NORTH DAKOTA, 153.]

VENDOR'S LIEN.—If the purchase of land is evidenced by contract alone, the purchase price not being paid, and the vendor retaining the legal title as security for the unpaid purchase money, he holds a lien upon the land, independent of his equitable lien, for the unpaid purchase price, by virtue of the contract; and such lien the vendee cannot, by conveyance or otherwise, affect, impair, or extinguish, except by payment of the purchase money.

MORTGAGE OF HOMESTEAD FOR UNPAID PURCHASE MONEY NOT SIGNED BY HUSBAND.—If land is purchased by contract, the purchaser using it as a homestead, and the vendor retaining the legal title as security for the unpaid purchase money, and subsequently, at the request of the purchaser, executing to the latter's wife a warranty deed to the land, she at the same time, and as part of the same transaction, executing to the vendor a mortgage on the land to secure such unpaid purchase money, such mortgage is valid, as security for the payment of such money, though not signed by the husband, and given to secure other and additional indebtedness of his.

MORTGAGE OF HOMESTEAD FOR UNPAID PURCHASE MONEY, executed by the fee owner, need not be signed by the husband or wife of such owner; and if such mortgage is given in part to secure indebtedness other than the purchase money, it is valid to the extent of the purchase money, though void as to the residue.

NOTICE.—RECORD OF DULY EXECUTED mortgages or conveyances, not absolutely void, is constructive notice to purchasers and subsequent encumbrancers.

E. C. Rice, for the appellants.

L. Hanitch and F. V. Banes, for the respondents.

153 BARTHOLOMEW, C. J. The plaintiffs and appellants brought this action to foreclose a mortgage upon certain realty in the city of Mandan. Thomas J. Mitchell and Sarah E. Mitchell, the grantors in said mortgage, and various other parties inter-

ested in said realty, including the Bismarck National Bank, were made defendants. The bank alone made defense. From the unquestioned findings of fact, we learn that, on and prior to July 8, 1881, the firm of C. S. Weaver & Co. owned the realty in question; that said firm was composed of C. S. Weaver and R. S. Munger, and the realty was held in the individual names of the said partners. On said July 8, 1881, said firm entered into an agreement with said Thomas J. Mitchell to sell to him the said premises for an agreed price, only a small portion of which was paid at the time, and the balance was evidenced by interest bearing notes, executed by Thomas J. Mitchell to C. S. Weaver & Co. To secure said notes, the legal title to said realty was retained by C. S. Weaver and R. S. Munger in trust for C. S. Weaver & Co. At the time of said purchase, Thomas J. Mitchell and Sarah E. Mitchell were husband and wife, and in October, following, they, with their children, moved into a house located on said premises, and so continued to occupy the same as their homestead until some time in the year 1888. That, in 1883, C. S. Weaver & Co. were succeeded by a corporation known as the "Weaver Lumber Company," to which all of the assets of the firm were duly transferred, including the said notes given by Thomas J. Mitchell as the purchase price for said realty. On December 4, 1884, the said Weaver Lumber Company, at the request of Thomas J. Mitchell, procured from C. S. Weaver and R. S. Munger a warranty deed for said premises, running to said Sarah E. Mitchell, which deed was duly delivered to the grantee; and at the same time, and as a part of the same transaction, the said Sarah E. Mitchell executed and delivered to said lumber company a mortgage on said premises, to secure a note then and there given by Thomas J. ¹⁵⁰ and Sarah E. Mitchell to said lumber company, and which said note included the balance then due on the purchase money notes and certain other advances then made by the lumber company to Thomas J. Mitchell. This mortgage was signed by Sarah E. Mitchell only. Both the deed and the mortgage were duly recorded. In 1886 the lumber company foreclosed this mortgage by advertisement, and procured a sheriff's certificate of sale; and, being largely indebted to the defendant the Bismarck National Bank, the lumber company assigned said certificate to said bank as partial security for said indebtedness. On July 19, 1888, the bank procured a sheriff's deed upon said certificate, and, on the same day, the Mitchells surrendered the premises to the bank, and it has at all times since been in possession. In March, 1885, and after the mortgage

to the lumber company was of record, Thomas J. and Sarah E. Mitchell executed and delivered to plaintiffs a mortgage upon the same homestead property, to secure a valid indebtedness, and the mortgage contained a covenant that the premises were free of all encumbrances except such as appeared of record. It was to foreclose this mortgage that this action was brought. On these facts, the trial court held that the mortgage executed by the wife alone upon the homestead premises constituted a valid lien, to the extent that such mortgage secured the purchase price for said premises, and no farther, and gave plaintiffs and the Mitchells ninety days in which to redeem from this sale under said mortgage, by paying the balance of the purchase price, with accumulated interest, less the net rent received by the bank. No such redemption having been made within the time granted, on motion final decree was entered in favor of the defendant the Bismarck National Bank, in accordance with the announced conclusions of law, and from that decree this appeal is taken.

The appellants assign and argue but one error, which is thus stated by counsel: "The evidence and pleadings show said lot 4 [the premises in question] to have been a homestead, and the mortgage under which the bank claims was not jointly ¹⁰⁰ executed by Sarah E. Mitchell and Thomas J. Mitchell, was void, and in it the bank had no equity as against plaintiff's claim." We do not think this assignment is good. It is true that the homestead rights will attach to land held under a contract of purchase. It attaches to the purchaser's equity in the land, whatever that may be: *Myrick v. Bill*, 5 Dak. 167, and cases cited. But there are certain burdens which adhere to the homestead as effectively as to nonhomestead property. Where a sale of land is evidenced by a contract only, and the purchase price has not been paid, and the vendor retains the legal title, the parties occupy substantially the position of mortgagor and mortgagee. The vendor has a lien for his purchase money by virtue of his contract, and a lien which the vendee cannot, by conveyance or otherwise, affect or impair, and which can be extinguished only by payment of the purchase money (see *Jones on Liens*, sec. 1107, et seq., where the authorities are fully cited), and, necessarily, this is not controlled by the use to which the property is applied. If used as a homestead, no one would contend that the vendor could be compelled to execute a deed without full payment, and look to the other property of the vendee for his purchase price, even in the absence of that statutory provision (*Comp. Laws*, sec. 2453) making the homestead liable

for any debt created for the purchase thereof. Such a vendor is not required to rely upon the technical vendor's lien, which is a creature of equity, and exists where the vendor has parted with the legal title, and may be destroyed at any time by a conveyance by the vendee. He has a more substantial and indestructible lien, created by contract, and of which all the world must take notice. Such was the lien held by C. S. Weaver & Co., upon the property in controversy after the contract of sale to Thomas J. Mitchell, in 1881, was made, and the notes for the purchase money received. On familiar principles, the subsequent transfer of all the assets of the firm of C. S. Weaver & Co., to the Weaver Lumber Company, including the purchase money notes, carried with it the security held by C. S. Weaver & Co., for the payment of such ¹⁶¹ notes. It is clear that down to December 4, 1884, the Weaver Lumber Company held a valid lien upon the property in controversy as security for the payment of the purchase money, good as against plaintiffs and all the world. On that date, the lumber company, at the request of Thomas J. Mitchell, caused to be delivered to Sarah E. Mitchell, his wife, a warranty deed for the premises. At the same time, and as part of the same transaction, Sarah E. Mitchell executed and delivered to the Weaver Lumber Company a mortgage upon said premises, to secure a promissory note then and there executed by Thomas J. Mitchell and Sarah E. Mitchell, to said lumber company, and which note included the balance due on the purchase money notes and other indebtedness of Thomas J. Mitchell to the lumber company. It is claimed that, because this mortgage was not signed by Thomas J. Mitchell, it was absolutely void, and constituted no security, even as to the purchase money. The statute of Dakota territory then in force reads as follows: "A conveyance or encumbrance by the owner of such homestead shall be of no validity, unless the husband and wife, if the owner is married and both husband and wife are residents of the territory, concur in and sign the same joint instrument." The homestead estate is created for the benefit of the family. The section above quoted is in furtherance of the same purpose, and, for the accomplishment of its object, must have a liberal construction. Nothing must be permitted under that statute which would add a burden to the homestead, or curtail its enjoyment. But the execution of the deed and mortgage were, in law, simultaneous acts. In not one instant of time prior to the execution of the mortgage was that property released from the contract lien for the unpaid purchase money.

The execution of the deed and mortgage changed the form, but in no manner the substance. No additional burden was cast upon the homestead by holding the mortgage valid to the extent of the unpaid purchase money. The purpose of the homestead law was in no manner hindered. The giving of the mortgage was not ¹⁶² an encumbrance of the homestead. The encumbrance existed prior to the execution of the mortgage. There was never any homestead exemption as against that purchase money, not only by reason of the contractual relations, but also by reason of the express language of section 2453, which declares that the homestead may be sold for any debt created for the purchase price thereof. Under the circumstances it has been repeatedly held, under statutes against alienation and encumbrance either identical with, or substantially like, ours, that a mortgage of the homestead to secure the purchase price money executed by the fee owner need not be signed by the husband or wife of such party: *Christy v. Dyer*, 14 Iowa, 438; 81 Am. Dec. 493; *Hopper v. Parkinson*, 5 Nev. 233; *Amphlett v. Hibbard*, 29 Mich. 298; *Austin v. Underwood*, 37 Ill. 439; 87 Am. Dec. 254; *Lassen v. Vance*, 8 Cal. 271; 68 Am. Dec. 222; *Carr v. Caldwell*, 10 Cal. 380; 70 Am. Dec. 740; *Nicols v. Overacher*, 16 Kan. 54; *Andrews v. Alcorn*, 13 Kan. 351. And, where such mortgage is given in part to secure indebtedness other than the purchase money, it is still held a valid lien to the extent of the purchase money, but void as to the residue: *Pratt v. Topeka Bank*, 12 Kan. 570, as explained in *Greeno v. Barnard*, 18 Kan. 522; *Dillon v. Byrne*, 5 Cal. 455. And see, also, *Swift v. Kraemer*, 13 Cal. 526; 73 Am. Dec. 603.

The mortgage executed by Sarah E. Mitchell to the Weaver Lumber Company constituted a valid lien between the parties, to the extent that it secured the purchase money of the mortgaged property. It was properly executed and of record, and appellants were bound to take notice of it. In the mortgage which they received, the property was declared free of all encumbrances, "except such as now appear of record thereon." Their attention was thus expressly drawn to the record, and they were informed that their grantors considered the property already encumbered. They could not ignore the record. It is only where a duly executed and recorded conveyance is absolutely void that the record fails to give constructive notice, and, in such case, neither constructive nor actual notice could aid the void instrument. Appellants found of record an encumbrance which might or might ¹⁶³ not be void. The record did not

disclose. The possession of the Mitchells might indicate that it was void, but that possession was not conclusive against a prior grantee. It worked no estoppel upon him. The decisive facts rested in parol. Appellants had that notice which required them to investigate the facts. Had they done so, they would have learned that the prior mortgage was in part valid. Having failed to do so, they must bear the consequences. *Swift v. Kraemer*, 13 Cal. 526, 73 Am. Dec. 603, is exactly in point. The case of *Higley v. Millard*, 45 Iowa, 586, upon which appellants confidently rely, is clearly distinguishable. Under the Iowa statute, the homestead was not exempt from sale under execution for a debt that existed prior to the acquisition of the homestead. The husband undertook to mortgage the homestead to secure such a debt. The debt was no lien upon the homestead until reduced to judgment. Until that occurred, the homestead might be alienated free from any lien or liability for such claim. Hence, the husband sought to throw upon the homestead an additional burden, which curtailed the homestead estate. This the court properly held was within the inhibition, and that the mortgage was absolutely void, and its record gave no constructive notice. The same principle runs through *Chopin v. Runte*, 75 Wis. 361. But those cases, for reasons already stated, are not in point here.

The decree of the district court is affirmed.

All concur.

HOMESTEAD—MORTGAGE BY ONE SPOUSE—PURCHASE MONEY.—A mortgage, not for purchase money, of his homestead by a married man, without his wife's signature, is absolutely void: *Alt v. Banholzer*, 89 Minn. 511; 12 Am. St. Rep. 681, and note in which the conveying or encumbering of the mortgage by one party to the marriage is fully treated.

HOMESTEAD—WHETHER SUBJECT TO LIEN FOR PURCHASE MONEY.—One who purchases land and pays portion of the purchase price becomes at once entitled to a homestead therein, subject to the lien for unpaid purchase money: *Dortch v. Benton*, 98 N. C. 190; 2 Am. St. Rep. 331. See, also, the discussion of this subject in the extended note to *Magee v. Magee*, 99 Am. Dec. 574.

RECORD AS NOTICE.—If a contract is referred to in a recorded mortgage, all persons claiming under it take with notice of such contract: *National Bank v. Morris*, 114 Mo. 255; 35 Am. St. Rep. 754, and note. Parties are bound, in the absence of fraud, to take notice of facts exhibited in a public record: *Backer v. Pyne*, 130 Ind. 288; 30 Am. St. Rep. 231, and note. One who takes a mortgage upon real estate has constructive notice of every fact which could have been ascertained by an inspection of the deeds and mortgages on record in the chain of title: *Kirsch v. Tozier*, 143 N. Y. 390; 42 Am. St. Rep. 729, and note.

HOSMER v. SHELDON SCHOOL DISTRICT.

[4 NORTH DAKOTA, 197.]

CONTRACT TO EMPLOY ONE AS A TEACHER IN THE PUBLIC SCHOOLS who has no certificate entitling him to do so, is void.

RELATION.—A certificate granted to one, authorizing him to teach in the public schools, cannot, by relation, take effect at any prior time, so as to validate a contract previously entered into between him and the school district employing him as a teacher therein.

E. Pierce, R. J. Mitchell, and E. Engerud, for the appellant.

P. H. Rourke, for the respondent.

¹⁹⁸ **BARTHOLOMEW, C. J.** On August 7, 1891, Sheldon school district No. 2, the appellant herein, being at that time a duly organized school district in Ransom county, in this state, by its proper officers, and by written contract in due and legal form, hired Benjamin W. Hosmer, the respondent herein, to teach one of its schools for the period of ten months, commencing September 1, 1891, for sixty dollars per month, payable at the end of each month. At the time specified, respondent commenced teaching. On November 21st following, he was discharged, for some reason that does not appear of record. After the full term of his employment had passed, he brought this action to recover the wages for the time during which he was not permitted to teach. At the trial below, appellant moved for judgment in its favor on the pleadings. The motion was denied, and, after a hearing on the merits ¹⁹⁹ had before the court, respondent had judgment for amount of his claim, less certain sums which he had earned at other employment during the time. From this judgment the appeal is taken, and the only errors assigned relate to the denial of the motion for judgment on the pleadings. The basis for this contention is found in the following statement, which appears in the complaint: "That on the seventh day of August, 1891, at Ransom county, in the state aforesaid, the plaintiff and defendant entered into a mutual written agreement, that the plaintiff should serve the defendant as a school teacher in the public schools at the village of Sheldon, in said school district No. 2, in the county of Ransom, and state aforesaid, and that the plaintiff should and did employ the defendant as such for the term of ten months from and after the first day of September, 1891, and pay him for such services sixty dollars per month. The particulars of such written agreement more fully appear by the duplicate original contract, hereto annexed, marked 'Exhibit A,' and made a part of this complaint. That on the first day of September, 1891, the

plaintiff entered upon the service of said defendant, under said agreement, and has ever since been, and was, during the entire life and continuance of said contract, ready and willing to continue such services. That the plaintiff was legally qualified to teach such school, having, at the time he entered into the employment of the defendant, a certificate of qualification, duly issued by the superintendent of schools of Barnes county, North Dakota, on the twenty-first day of July, 1890, for the term of three years from and after said date. That the same was duly indorsed by the superintendent of Ransom county, North Dakota, on the twenty-ninth day of August, 1891, and the formal entry thereof made on said certificate on the fourth day of September, 1891. That on or about the twenty-first day of November, 1891, the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, though the plaintiff then and there offered to continue said services, and perform said agreement on his part, to the damage of the plaintiff in the sum of four hundred twenty dollars."

200 Section 75, chapter 62, of the Laws of 1890, as amended by section 15, chapter 56, of the Laws of 1891, reads as follows: "It [the school board] shall employ the teachers of the schools of the district, and may dismiss any teacher at any time for plain violation of contract, gross immorality, or flagrant neglect of duty; provided, that no person shall be employed as teacher, or permitted to teach in any public school, who is not, when so employed or permitted to teach, the holder of a teacher's certificate, valid in the county or district in which such school is situated; provided, further, that every contract for the employment of a teacher must be in writing, and such contract must be executed before such teacher begins to teach in such school. It shall grade the salaries of teachers for the district in accordance with the grades of certificates; and no teacher holding a certificate of a lower grade shall be paid a salary equal to or in excess of that paid to a teacher of higher grade in the same district."

Section 122, chapter 62, of the Laws of 1890, as amended by section 24, chapter 56, of the Laws of 1891, reads as follows: "No certificate or permission to teach shall be issued to any person under eighteen years of age; and no first grade certificate shall be issued to any person who is under twenty years of age, and who has not taught successfully twelve school months; and a third grade certificate shall not be issued more than twice to the same person. The certificates issued by a county superintendent shall be valid only in the county where issued; pro-

vided, that a first grade certificate may be renewed once without examination, at the discretion of the county superintendent, upon payment of the proper fee for the institute fund, as provided in the case of examination; provided, further, that a first grade certificate shall be valid in any other county in the state when indorsed by the county superintendent of such county. No person shall be employed or permitted to teach in any of the public schools of the state, except those in cities organized for school purposes under special laws, who is not the holder of a lawful certificate of qualification or permit to teach. Any contract made in violation of this section shall be void."

²⁰¹ It appears from the complaint that on August 7, 1891, when the written contract between respondent and appellant was entered into, respondent held a first grade certificate issued by the superintendent of Barnes county. This certificate would be valid in Ransom county when indorsed by the superintendent of schools for such county. Such indorsement was not made until September 4, 1891. The allegation is, that it was made August 29, 1891, and the formal entry made on September 4th. But it was the formal entry that constituted the indorsement, and what preceded that was but a promise to indorse. Hence, neither at the time of entering into the contract, nor at the time of commencing to teach, did respondent hold a certificate valid in Ransom county. For that reason, appellant contends that the contract of employment dated August 7, 1891, was void, under said section 122, and that no action can be maintained thereon or for breach thereof. If the original contract was void when made, it could not be ratified. After the removal of the inhibition, a new and valid contract might be made relative to the same subject matter, but the void contract remains, and ever must remain, a nullity. Where the invalidity of the contract arises, as in this case, if this contract be invalid, from a prohibition, and not from any vice adhering to the subject matter of the contract, courts are inclined to be liberal in construing distinct acts in part performance of the contract, after the prohibition has been removed, as raising a new implied contract: See *Hots v. School Dist.*, 1 Col. App. 40; *Scott v. School Dist.*, 46 Vt. 452. But there is no direct allegation in the complaint that respondent taught a day after he had his certificate indorsed, or that the appellant in any manner acted upon or recognized the void contract. There may be an inference in that direction, but it falls far short of an allegation that can support a recovery. The action is for breach of contract in not

permitting respondent to teach. Hence he pleads the written contract, and relies exclusively thereon. Nor must we be understood as holding that recovery could be had on an implied contract for services actually ²⁰² rendered, or offered to be rendered, after the proper certificate was received, when the original contract was void: See remarks of Corliss, C. J., on this point, in *Goose River Bank v. Willow Lake School Tp.*, 1 N. Dak. 26; 26 Am. St. Rep. 605, and authorities then cited.

In the case just cited, the court said, in speaking of certain school warrants then involved: "They were issued to pay for services of a teacher who held no lawful certificate of qualification. No such person can be employed to teach. The statute so declares, and any contract made in violation of this provision is void, by the express terms of the same act." This language was based upon the wording of the statute, and the authorities were not specially noticed, as the point was secondary in that case, and not seriously controverted. Since, in that case, the teacher had no certificate at the time of making the contract, or at the time of rendering the services, it may be, as counsel now suggests, that it was not absolutely necessary to make the statement as broad as in that case. But, upon further consideration of the statute, and a study of the decisions under similar statutes, we adhere to our former language to its full extent. We hold that any contract of employment as teacher in our public schools, saving the exceptions contained in the statute, where the person hired does not, at the time of making such contract, hold a certificate authorizing him to teach in the county where the school is located, is void. And, being void, it cannot be ratified, nor can it receive vitality from the happening of a subsequent event. It "is so nugatory and ineffectual that nothing can cure it": *Black's Law Dictionary*.

The learned counsel for respondent is correct in stating that the evil against which the statute was directed consisted in having the public schools taught by unqualified persons. And there are cases supporting the contention that when the teacher held the proper certificate at the time the services were rendered, or offered to be rendered, the statute was sufficiently met; and the teacher entitled to recover under the contract: *Hotz v. School* ²⁰³ Dist., 1 Col. App. 40, is of that class. A recovery of damages for breach of the contract was allowed there, in a case very similar to this. But the difference in the statutes clearly distinguishes the cases. The Colorado statute prohibited the school district officers from employing a teacher who did not

hold a proper certificate. There was no penalty fixed for the violation of the provision on the part of the officers, nor was the contract declared void. It was provided that the teacher should be entitled to no compensation during the time that he held no certificate, thus clearly implying that, for services rendered after he received the proper certificate, he would be entitled to compensation. But even then the court was not content with relying upon the statute, and also placed the case upon an implied contract. In *School Dist. v. Dilman*, 22 Ohio St. 194, the court held that a statutory provision that "no person shall be employed as a teacher," etc., "unless he shall have first obtained a certificate," etc., meant, in effect, that no person should be engaged in teaching until he had obtained a certificate, and that a contract entered into before the party had obtained a certificate was valid, provided the certificate was obtained before the party engaged in the discharge of his duties as teacher. But it is entirely clear that our statute will not bear this construction. Engaging in the performance of the duties of a teacher neither constitutes nor consummates a contract. The only contract connected with the subject is the written agreement by which the proper school officers employ or hire the teacher. It is that contract, and no other, that the statute declares void under the circumstances stated. And this statute was proper and necessary, in order to prevent the employment of unqualified persons as teachers. If a completed contract is valid when made, it is difficult to understand how performance thereunder is to be prevented without incurring liability. If a completed contract is valid when made, it is not easy to perceive how it can become void, and the conditions remain unchanged. Statutes similar to ours, although perhaps none of them quite so strong, have been construed in accordance with our views in the following cases: ²⁰⁴ *Butler v. Haines*, 79 Ind. 575; *Jenness v. School Dist.*, 12 Minn. 448; *Ryan v. School Dist.*, 27 Minn. 433; *Botkin v. Osborne*, 39 Ill. 101. The case from Indiana expressly holds that the subsequent procurement of a certificate, and continuing to teach thereafter, did not entitle the party to recover. The case in 12 Minnesota is very strong. The contract was made on the twenty-second day of the month, the school to commence on the 24th of the same month. The applicant had no certificate when the contract was made, but received his certificate on the 24th, and actually taught the entire term. It was held that he could not recover. There is no legal hardship in these cases. An unqualified person cannot enter into a contract to teach in

our public schools without being a party to the violation of a mandatory statute, the terms of which he is conclusively presumed to know.

The respondent in this case cannot recover upon his complaint. The judgment of the lower court is reversed, and that court is directed to sustain appellant's motion for judgment on the pleadings.

All concur.

/SCHOOLS—NECESSITY FOR CERTIFICATE TO ENTITLE TEACHER TO COMPENSATION.—One who teaches school without a certificate of qualification, in violation of the express terms of a statute, is not entitled to compensation for his services, even though the school officers have issued a warrant therefor: *Goose River Bank v. Willow Lake School Tp.*, 1 N. Dak. 26; 26 Am. St. Rep. 605, and note.

CUTTER v. POLLOCK.

[4 NORTH DAKOTA, 205.]

ASSIGNMENTS FOR BENEFIT OF CREDITORS—PREFERENCES.—An insolvent debtor may secure one creditor in preference to another, except when he executes an assignment for the benefit of his creditors.

PREFERENCE BY MORTGAGE.—The execution, by an insolvent debtor, of chattel mortgages on substantially all of his property, securing and preferring certain of his creditors, to the exclusion of others, is valid, and does not constitute a general assignment for the benefit of creditors, although the effect of giving such mortgages is to prevent the mortgagor from continuing his business.

RECEIVERS—FEES OF—TAXATION OF AS COSTS.—It is reversible error for the court, without examination of a receiver's account, to direct that all such receiver's expenses and compensation shall be taxed as costs by the clerk of the court against the unsuccessful party to the suit, and the amount thereof entered in the judgment.

RECEIVERS—COMPENSATION, BY WHOM FIXED.—The clerk of the court is not the proper officer to settle the amount of a receiver's fees and expenses. That is a judicial question; it, and all matters relating thereto, the court should dispose of in its final decision.

Newman, Spaulding & Phelps, and Bartlett & Lovell, for the appellant.

Pollock & Scott and C. A. Pollock, for the respondents.

205 CORLISS, J. This case involves a question of statutory construction. The contention on the part of the plaintiffs and appellants is, that the transaction to which we will refer constituted an assignment for the benefit of creditors containing preferences, and that therefore the transactions are without any other legal effect than to make the property to which they re-

late a trust fund to be distributed proportionately among all creditors of the owner of such property. The plaintiffs, claiming to be creditors of James R. Pollock, commenced this action in equity to have the property referred to declared a trust fund, under the provisions of section 4660 of the Compiled Laws. That section provides as follows: "An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust toward the satisfaction of his creditors, in conformity to the provisions of this title; subject, however, to the provisions of this code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specified classes of persons; provided, moreover, that such assignment shall not be valid if it be upon, or contain, any trust or condition by which any creditor is to receive a preference or priority over any other creditor; but, in such case, the property of the insolvent shall become a trust fund, to be administered in equity, in the district court, and shall inure to the benefit of all of the creditors in proportion to their respective claims or demands." Pollock was a merchant engaged in business at Casselton, in this state. October 2, 1889, he executed three chattel mortgages upon his stock of goods and his store fixtures, to secure claims held against him by the defendants Straw, Ellsworth Manufacturing Company, Eveline Pollock, and the Cass County Bank. These mortgages were executed and delivered to these defendants, respectively, and were successively filed for record in the office of the register of deeds of Cass county, North Dakota, the same day. They were all executed as part of one transaction. The value of the mortgage property was twelve thousand dollars. The debts so secured did not amount to seven thousand dollars. While it appears ²⁰⁹ from the record that Pollock owned at the time some other property, we will assume, for the purposes of this case, that these mortgages covered substantially all of his property not exempt from execution. Pollock appears to have been insolvent at this time. A few hours after these mortgages were given and delivered, the mortgagor turned over all the mortgaged property to the mortgagees, who at once proceeded to foreclose the mortgages by advertising the property for sale thereunder. Each contained a provision that the mortgagee might immediately take possession of the mortgaged property. While these foreclosure proceedings were being had, the plaintiffs instituted this action, and had a receiver appointed to take and hold possession of the mortgaged prop-

erty, or its proceeds, pending this action. Judgment having been rendered against the plaintiffs, adjudging that the mortgages were valid liens upon the property, and that plaintiffs had no right or interest in the mortgaged property, the plaintiffs have appealed to this court from such judgment.

It is here urged that the facts of this case bring it within the decision of the territorial supreme court in *Straw v. Jenks*, 6 Dak. 414, and that that decision should be followed by this court. We are by no means satisfied that Pollock, when he executed these mortgages, had considered that he would no longer continue in business, and had decided to yield up dominion of his entire property. But we will again assume a state of facts as favorable to plaintiffs as the record will justify. We will take it for granted that Pollock intended to give these mortgagees a preference, knowing that the consequence of the execution of such mortgages, and the abandonment to the mortgagees of the possession of the mortgaged property, would be to force him to abandon his business. But it is very clear that he did not intend to surrender control over the mortgaged property, except so far as was necessary to accomplish the payment of the mortgagees named therein. The mortgages created mere liens. The legal title to the property remained in the mortgagor. After these ²¹⁰ preferred creditors had been paid, the possession of the remaining property would revert to him; and at all times any of his creditors could have levied upon his interests in the mortgaged property, and sold it to pay such creditors' claim. To assert that a mortgagor, who has created a mere lien on property (especially where, as in this case, the value of the property is largely in excess of the claims secured by the mortgage), has parted with all control over the property, is to ignore the character and legal effect of the instrument under which he has surrendered possession. Despite the mortgage, it is still his property. He may sell it. He may mortgage it. It may be seized for his debts. How such a transaction can be held to be an assignment for the benefit of creditors is inexplicable to us. An assignment for the benefit of creditors creates a trust, vesting the legal title in the assignee, and placing the property beyond the control of the assignor or the reach of any of his creditors, except as they have a right, under the assignment, to share in the distribution of the assigned estate. It is for this reason that assignments for the benefit of a portion of the assignor's creditors have been held void under the statute invalidating all transfers which delay creditors. In such a case, the debtor would, if

the transaction were valid, be able to place for a time his property beyond the reach of the creditors who have no rights under the assignment, because that portion of the assigned estate which would come back to him after the trust had been executed would, during the existence of the trust, be withheld from the reach of such creditors. But a mortgage creates no trust. It creates a mere lien. It is in no respect assimilated to an assignment for the benefit of creditors, and yet, by the express terms of the statute, it is in only such an assignment that the law condemns a preference. The common law recognized the right of a debtor to secure or pay one creditor in preference to all others. The general rule is embodied in our statute. Section 4654 of the Compiled Laws declares that "a debtor may pay one creditor in preference to another, or may give one creditor security for the payment of his demand in preference to another." Section 4660 ²¹¹ takes a certain class of transactions out of this general rule. But we must not lose sight of the fact that preference is the rule in this jurisdiction, and that he who questions the right of a debtor to make a preference must lay his hand upon the law which takes away this right in a given case. The legislature has seen fit to draw the line at instruments which constitute assignments for the benefit of creditors. Such instruments must not contain preferences. If they do, they are void, and the property becomes a trust fund for the equal benefit of all creditors. But this statute does not attempt to prevent the giving of security to one or any number of creditors in preference to others, and section 4654, in terms, allows this to be done. To hold that a chattel mortgage is an assignment for the benefit of creditors, that the creation of a mere lien is the creation of a trust, that retaining title to property is surrendering all control over it, displays an utter disregard of well-settled legal distinctions. To extend the construction of the statute to embrace a transaction of the character disclosed by this record, under the specious pretext of following the spirit of the law, is downright usurpation of legislative functions. To us, the fallacy of the reasoning in the case of *Straw v. Jenks*, 6 Dak. 414, and in the other cases in which the rule there enunciated is laid down, is in the assumption that preference is the exception, and not the rule, whereas the general rule permits preference, and he who claims that a preference is illegal must bring the case within the particular exception embodied in section 4660. The statute does not declare that one who has decided to apply all his property in payment of his debts, as far as it will apply, must dis-

tribute it among his creditors ratably. This he must do if he executes a general assignment. But the law does not compel him to make a general assignment, and it does permit him to pay or secure any creditor in preference to another. Of course, this statute allowing preferences relates to insolvent debtors. When a debtor is solvent, there can arise no question of preference. It is only when he is insolvent that the right to prefer is of any value to him, or to the creditor preferred. An insolvent debtor may, therefore, ²¹² pay one creditor in preference to others, although it takes every dollar of his property to make the payment. It is only when he executes an assignment for the benefit of all of his creditors that he cannot discriminate and favor. Then he must place all creditors on an equal footing. If he does not, the law and the courts will do it for him. The argument in *Straw v. Jenks*, 6 Dak. 414, and similar cases is, that the object of the law will be defeated if the rule there enunciated is not adopted. This reasoning assumes that the object of the statute is something other than it is therein expressed to be. The purpose of the law, if the language in which that purpose is couched is to be our guide, is, that the general rule permitting preferences shall be abrogated in a single class of cases, i. e. where a debtor executes such an assignment for the benefit of creditors as the act embraced in the title in which section 4660 is found refers to. An analysis of this act (Comp. Laws, secs. 4660-4680) discloses a legislative intent therein to deal with assignments for the benefit of all the assignor's creditors. In such an instrument there shall be no preference. In every other transaction the debtor may prefer. The case of *Straw v. Jenks*, 6 Dak. 414, has been overruled by the South Dakota supreme court in an opinion whose logic, to our mind, is unanswerable: *Sandwich Mfg. Co. v. Max*, 5 S. Dak. 125. *Straw v. Jenks*, 6 Dak. 414, merely followed *White v. Cotzhausen*, 129 U. S. 329. This case merely followed what the court regarded as the rule in Illinois, as laid down in *Preston v. Spaulding*, 120 Ill. 208. In a later case, the federal supreme court has ruled differently in a case arising in Missouri, following a different rule adopted in that state: *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 235. In this case, Mr. Justice Gray expressly declares that all the court intended to do in *White v. Cotzhausen*, 129 U. S. 329, was to construe the Illinois statute in accordance with what it understood to be the decision of the supreme court of that state. That the federal supreme court, in *White v. Cotzhausen*, 129 U. S. 329,

did not correctly interpret the decision of the Illinois supreme court in *Preston v. Spaulding*, 120 Ill. 208, is evident ²¹³ from later decisions of that court: See *Farwell v. Nilsson*, 133 Ill. 45; *Weber v. Mick*, 131 Ill. 520. And see *Moore v. Meyer*, 47 Fed. Rep. 99; *Schroeder v. Walsh*, 120 Ill. 403. There is nothing in *Farwell v. Cohen* (Ill.), 28 N. E. Rep. 35, opposed to the views expressed in *Farwell v. Nilsson*, 133 Ill. 45. In many of the cases, there was, in fact, a general assignment for the benefit of creditors executed. When a debtor, with the purpose of executing such an assignment, makes transfers of property or gives security or pays money before executing the assignment, for the express purpose of evading the provisions against preferences—when his purpose, known to the favored creditor, is to accomplish by independent instruments what could not be accomplished in the assignment itself—and, thus deliberately attempting to evade the law, thereafter executes a general assignment for the benefit of all the rest of his creditors, it is possible that the instruments giving the preferences should be regarded as part of the assignment, and that, therefore, the preference should be held to be contained in the assignment itself, and consequently of no effect. But, in such cases, the transactions ought not to be too far apart, and certainly the preferred creditors should be proven to have had knowledge of the debtor's purpose to make an assignment at the time of giving the preferences: See, in this connection, *Manning v. Beck*, 129 N. Y. 1; *Lake Shore Banking Co. v. Fuller*, 110 Pa. St. 156.

We hold that these chattel mortgages did not constitute a general assignment for the benefit of creditors, and that the debtor had a perfect right to execute them to the creditors therein named, to secure his obligations to them. It therefore followed that the mortgaged property was not a trust fund in which all the creditors of defendant Pollock had an interest, but was his property, on which there were mortgage liens held by such of the defendants as were named in the three mortgages as mortgagees. As sustaining our conclusions, we cite *Sandwich Mfg. Co. v. Max*, 5 S. Dak. 125; *Hargadine v. Henderson*, 97 Mo. 375; *Union Bank of Chicago v. Kansas City* ²¹⁴ Bank, 136 U. S. 235; *May v. Tenny*, 148 U. S. 60; *Farwell v. Nilsson*, 133 Ill. 45; *Weber v. Mick*, 131 Ill. 520; *Schroeder v. Walsh*, 120 Ill. 403; *Tompkins v. Hunter*, 24 N. Y. Supp. 8; *Cross v. Carstens*, 49 Ohio St. 548; *Moore v. Meyer*, 47 Fed. Rep. 99; *Crow v. Beardsley*, 68 Mo. 435; *Gilbert v. McCorkle*, 110 Ind. 215; *Watterman v. Silberberg*, 67 Tex. 100; *Warner v. Littlefield*, 89 Mich. 329;

Sheldon v. Mann, 85 Mich. 265. Other cases might be cited, but this question has been so often discussed, and the decisions so many times reviewed, that we feel that it would be a waste of time for us to travel again over the same ground. With the exception of *Straw v. Jenks*, 6 Dak. 414, *White v. Cotzhausen*, 129 U. S. 329, and a few other cases, all of the decisions which have struck down preferences have been in cases in which it appeared that an assignment for the benefit of creditors was in fact executed; and the court in those cases held that the instruments creating the preferences were so connected in point of time, and by the circumstances of the transactions, with the subsequent general assignment, that they were a part of it, and that, therefore, the preferences, were, in contemplation of law, embodied in the assignment itself. Such, among others, were the cases of *Preston v. Spaulding*, 120 Ill. 208; *Berger v. Varrelmann*, 127 N. Y. 281; *Clapp v. Nordmeyer*, 25 Fed. Rep. 71; *Burnham v. Haskins*, 79 Mich. 35.

The judgment of the district court was, therefore, right, in so far as it adjudged that the mortgaged property, or its proceeds, in the hands of the receiver, should be turned over to the defendants entitled thereto under such mortgages. But the judgment is attacked by this appeal in another particular. On motion of the plaintiffs, and against the opposition of the defendants, a receiver was appointed to take possession of the mortgaged property pending the litigation. In one of its conclusions of law, the court held that the fees and expenses of the receiver, which were not settled by the court, should be taxed by the clerk of the court as costs in the case, and that the amount of such costs should be ²¹⁵ inserted in the judgment. It does not expressly appear that this was done, but we think it is a fair inference that it was done, as the judgment against the plaintiffs is for nearly five thousand dollars costs, and we know that no such bill of costs could have been taxed against the plaintiffs unless the fees and expense of the receiver were embodied therein. This fact strengthens the natural inference that the rule of law laid down in the court's decision was followed by the clerk, at the instance of the defendants, in taxing the costs, and entering the amount thereof in the judgment. These items, we are clear, have no place in a bill of costs. If they belong there at all, it is only as disbursements, and such disbursements the statute does not authorize to be taxed against the unsuccessful party: Comp. Laws, sec. 5189. It is obvious that the clerk is not the proper officer to settle the question of a receiver's com-

pensation. That is a judicial question. Nor should it be left to him to determine what expenses are reasonable and proper. A receiver may be so extravagant in his expenditures that it would be highly unjust to allow him credit for all the moneys he has paid out. Had such state of facts existed in this case, the clerk nevertheless must have inserted all the items of disbursements in the bill of costs, provided he was satisfied that they had, in fact, been incurred. Again, we think it is not the proper practice for the court to determine, in advance of a hearing on the different items of a receiver's account, that all his disbursements should be paid by one party or the other to the litigation. An examination of his account in connection with surrounding circumstances might disclose the fact that some of the items ought to be paid by the successful party. They might embrace expenditures which the successful party would have been compelled to make himself, had it not been for the receivership, but which he was saved, by such receivership, the necessity of making himself. The proper practice, where a receiver has been appointed, is for the court, after it has reached its conclusion, to order the receiver to account, on notice to all parties interested; and, upon such accounting, all questions can be settled, ²¹⁶ and the findings of fact and conclusions of law relating to such matters can be embodied in the decision of the court on the merits of the action. The final decree should settle what compensation the receiver is to have, what expenditures he shall be reimbursed for, how he shall be paid—whether out of the funds in his hands, or by one of the parties to the action, or whether part of his fees and expenses shall not be paid out of such funds, and the rest by one of the parties to the case, or whether such amount shall not be apportioned so that some of it shall be paid by one party and the balance by the other. If the receiver is allowed to pay, and reimburse himself out of the moneys in his hands, the decree should provide whether the owner of such moneys shall be indemnified by the recovery of judgment against some other party to the case for this invasion of his property. Ordinarily it would seem to us (but we do not decide the point) that the receiver should be protected by being permitted to look to the funds in his hands to save him against loss. This appears to have been done in this case. Such rule may, however, work great hardship in particular cases; and in some instances the receiver has, on this account, been compelled to look for indemnity to the party at whose instance he was appointed: See *Weston v. Watts*, 45 Hun, 219; *French v. Gifford*, 31 Iowa, 428; *Verplanck*

v. Verplanck Ins. Co., 2 Paige, 438. Certainly, if the court, in such a case, allows him to pay himself out of the funds, it should compel the other party to the action to make good the loss thus occasioned to the successful litigant. It is impossible for a court to make an intelligible decree when property is in the hands of a receiver, and is to be disposed of by the decree, without settling in advance the rights of the receiver with respect to compensation and expenditures, and whether he shall be allowed to pay himself out of the funds in his hands. The decree should determine whether the whole fund, or only the balance, after paying the receiver, should be turned over to the successful party. In this case, the court has directed the receiver to pay over every dollar that he has received, without making any deduction for his fees ²¹⁷ and expenses, and yet the defendants are allowed to tax up as costs against the plaintiffs the amount of such fees and expenses, on the theory that they have been paid by the defendants out of their property. The court seems to have proceeded on the theory that the receiver would retain the amount of his fees and disbursements without any authority from the court so to do, and without any investigation as to the reasonableness of his charges and expenditures, and that then the clerk should tax up against the plaintiffs, as costs, whatever amount appeared to have been thus retained by the receiver, out of the funds in his hands belonging to defendants. None of these things were settled by the decree. They were left to the decision of the clerk and the receiver himself. Under the system of practice prevailing at the time the case was decided, findings were required to be made in equity cases, as well as in actions at law. This must be taken into consideration in establishing the proper practice in cases like the one before us on this appeal. There can be only one final judgment, and this should settle all matters involved in the litigation, as well as the rights of the receiver, and the rights and liabilities of the parties to the action growing out of the receivership, as the rights of the parties to the litigation on the merits of the case, independently of the receivership. This final judgment must rest upon findings of fact and conclusions of law, and these, therefore, should embrace all matters essential to a full determination of the rights of the receiver with respect to compensation and indemnity, and the rights and liabilities of the parties to the suit, growing out of the payment to the receiver of his fees and expenses, as well as all matters relating exclusively to the merits of the controversy. Until all questions touching the receivership are settled, it is impossible

finally to determine the rights of the parties to the case. The scope of the judgment awarding the fund to the successful party cannot be prescribed by the court until it decides whether any of this fund shall be retained by the receiver for his compensation and expenditures. The exact judgment which the victorious litigant shall recover against the ²¹⁸ defeated suitor cannot be ascertained until the court has determined whether, in the first instance, the fund belonging to the former shall be depleted by payment of the receiver's fees and expenses, and, if so, whether the unsuccessful party shall make it good to his antagonist in whole or in part.

We conclude that it was error for the court to render final judgment, without passing upon the receiver's account, and settling all matters connected with the receivership. These questions should not have been left to the clerk. The judgment is reversed, and the district court is directed to enter a new judgment after all matters connected with the receivership have been investigated and settled. But the case will not be reopened for a new trial on the merits. The question of the rights of the defendants to the funds in the hands of the receiver is settled, subject to such modification. The district court, without reopening questions touching the merits, will inquire into the amount of property and money in the hands of the receiver, or for which he is properly chargeable; will ascertain what compensation is proper, what disbursements actually made were necessary; will determine whether the receiver shall be paid and reimbursed out of the funds in his hands, and what proportion of his fees and expenses ought to be borne by the plaintiffs and defendants, respectively, or whether the plaintiffs ought ultimately, or in the first instance, to pay all of such fees and expenses. All these matters should be embodied in the findings and the final judgment. We do not wish to be regarded as holding that the decision of the district court upon these various questions will be final. It is possible they may be subject to review. There is also an appeal from an order of the district court made on appeal from the taxation by the clerk of the receiver's fees and expenses as costs, which order affirms such taxation. The order is reversed for the reasons already stated.

All concur.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—PREFERENCES.—A debtor may lawfully prefer one creditor over another: *Kalmus v. Ballin*, 52 N. J. Eq. 290; 46 Am. St. Rep. 520, and note; *Benham v. Ham*, 5 Wash. 123; 34 Am. St. Rep. 851, and extended note.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—GENERAL ASSIGNMENT—VALIDITY OF PREFERENCES.—Under the Missouri statute, a preference of any creditor in a voluntary assignment for the benefit of creditors renders such assignment void: *Larrabee v. Franklin Bank*, 114 Mo. 592; 35 Am. St. Rep. 774, and note. A preference to a creditor given by a general deed of assignment does not invalidate it, but, though such a deed is not fraudulent in itself, it will be watched with jealousy: *Arthur v. Commercial etc. Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719, and note. See, also, the extended note to *Benham v. Ham*, 34 Am. St. Rep. 856.

RECEIVERS—COMPENSATION OF—HOW REGULATED.—In the absence of legislation regulating the compensation of a receiver, the court appointing him has the right to determine the amount that shall be paid, and, in passing upon such compensation, the appellate court ordinarily defers to the judgment of the appointing court: *Heffron v. Rice*, 149 Ill. 216; 41 Am. St. Rep. 271.

BIRCHALL v. GRIGGS.

[4 NORTH DAKOTA, 305.]

ATTACHMENT.—AN AFFIDAVIT for attachment, stating that the defendant is not a resident of the state, or has departed therefrom, "without stating that such departure was with intent to defraud his creditors, or to avoid the service of summons," is insufficient to confer jurisdiction upon the court, and, in the absence of personal service of the summons, all proceedings thereunder are void.

Bangs & Fisk, for the appellant.

F. B. Morrill, for the respondent.

³⁰⁶ BARTHOLOMEW, C. J. This is an appeal from an order refusing to vacate a judgment and dismiss an action. Respondent sued ³⁰⁷ appellant in the Cass county district court, and obtained jurisdiction in rem, if at all, through the provisional writ of attachment and publication of summons. There was no service outside the state, nor was any copy of the summons and complaint ever mailed to appellant. Judgment was entered for want of an answer. Afterward, appellant appeared specially, and moved to set aside the judgment, and all proceedings thereunder, and dismiss the action for want of jurisdiction. One of the grounds for said motion was, that the attachment affidavit failed to allege any ground for attachment. From the order denying this motion, the appeal was taken.

Among other grounds, that need not be stated, our statute allows an attachment upon an affidavit stating that the defendant is not a resident of the state, or has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons: Comp. Laws, sec. 4995. The ground for attachment stated in the affidavit in this case is as follows: "That the defendant is

not a resident of the state of North Dakota, or has departed therefrom." That this affidavit is insufficient to confer jurisdiction is clear upon plain principles of law. The remedy by attachment is purely statutory. It is harsh, arbitrary, and condemns without hearing. It cannot be used, except upon substantial compliance with every requirement of the statute. In 1 American and English Encyclopedia of Law, page 901, it is said: "The affidavit is the foundation of the jurisdiction of the court. It must be a sworn statement of such facts as the law requires as a condition precedent to the issue of the writ. Its entire omission, or the omission of any essential fact, will render all the proceedings coram non judice": And see the authorities there cited. The allegations of the affidavit must be specific and clear. It is elementary that different grounds for attachment cannot be alleged in the alternative, because in that case affiant swears neither to one ground nor to the other: Wade on Attachment, sec. 56. But the affidavit in this case is much worse. It states that the defendant is a nonresident of the state. Had it contained nothing more, it would have been good; ~~309~~ but the affiant, probably not being willing to swear that defendant was a nonresident of the state, added, "or has departed therefrom." But this latter fact is, in itself, entirely innocent. It gives a creditor no right to seize the defendant's property, unless the affidavit also shows that such departure was with intent to defraud creditors or avoid the service of summons. Clearly, the affidavit states no ground for attachment, and conferred no jurisdiction.

It is urged, however, that since the motion asked that the judgment be set aside, and all proceedings thereunder annulled and the case dismissed, the appearance was, in fact, general, although stated to be special. The motion asked only what must necessarily follow without asking, in case the court never acquired jurisdiction. The appearance was special. The order appealed from is reversed, and the district court directed to enter an order setting aside such judgment, annulling all proceedings thereunder, and dismissing the case.

Reversed.

All concur.

ATTACHMENT—AFFIDAVIT.—An affidavit in attachment stating the names of the parties, the amount of indebtedness, that defendant has concealed himself to avoid service of process, and that his whereabouts are unknown, though defective in failing to state the nature of the indebtedness, the defendant's place of residence, or that such place is unknown, or cannot, upon diligent inquiry, be ascertained, is voidable,

but not void, and is sufficient to give the court jurisdiction of the subject matter: *Hogue v. Corbit*, 156 Ill. 540; 47 Am. St. Rep. 232, and note. See, also, the note to *Bunneman v. Wagner*, 8 Am. St. Rep. 310, and the extended note to *Fridenberg v. Pierson*, 79 Am. Dec. 165.

HANNAH v. CHASE.

[4 NORTH DAKOTA, 351.]

DEEDS—EVIDENCE.—A RECITAL IN A SHERIFF'S DEED, under foreclosure proceedings by advertisement, that the grantee therein is "the Globe Investment Company, formerly Dakota Mortgage Loan Corporation," is no evidence that such company succeeded to the rights of such corporation.

SHERIFF'S DEED TO ASSIGNEE.—If a sheriff executes a certificate of purchase to one party, and subsequently issues a deed to another, it is not presumed that the latter has succeeded to the rights of the former.

PRESUMPTIONS IN FAVOR OF THE LEGALITY OF OFFICIAL ACTS never go to the extent of supplying a jurisdictional fact.

EVIDENCE—PRESUMPTION AS TO ACTS OF OFFICER.—A sale under a power contained in a mortgage foreclosed by advertisement, is not a judicial sale, when conducted by an officer specially authorized by statute. The presumption that such officer has done his duty does not apply to such a transaction.

F. B. Merrill, for the appellant.

W. E. Purcell and C. E. Wolfe, for the respondent.

352 BARTHOLOMEW, C. J. This action was brought under section 5449 of the Compiled Laws, to determine adverse claims to the southeast quarter of section 23 in township 131 north, range 53 west, in Sargent county. Both parties claim title from one Winfield S. Wolfe. The trial below was to the court, and defendant prevailed. Plaintiff prosecutes this appeal. Defendant is in possession. It is only after plaintiff has shown a right in himself, superior to the right of possession, that defendant's title becomes material. We may, therefore, enter at once upon a consideration of plaintiff's title. **353** The facts upon which he relies are undisputed. It is simply the right that the law gives him from such facts that is questioned. In February, 1885, Winfield S. Wolfe, the fee owner of said land, executed a mortgage thereon in favor of the Dakota Mortgage Loan Corporation, which was duly recorded. Upon a subsequent default, this mortgage was foreclosed by advertisement, and a sheriff's certificate of sale issued to the mortgagee on June 2, 1888. This certificate was properly recorded, as was also the usual affidavit of publication and what purported to be a sheriff's affidavit of sale; but this last instrument was sworn to before the register of deeds

of Sargent county, an officer who, at that time, was without authority to administer an oath. No redemption was made or attempted, and on January 3, 1890, a sheriff's deed was executed upon such certificate, and in the deed the grantee is named and described as "the Globe Investment Company, formerly Dakota Mortgage Loan Corporation, of the county of Suffolk and commonwealth of Massachusetts." This grantee subsequently conveyed the land to the plaintiff herein by warranty deed. Upon the foregoing instruments, or duly authenticated copies thereof, plaintiff rested his right to recover. Plaintiff also sought to introduce a copy of a statute purporting to have passed by the legislature of Massachusetts in 1888, by which the name of "Dakota Mortgage Loan Corporation" was changed to "Globe Investment Company." This copy was authenticated only by the certificate of a notary public, to the effect that he had compared it with the engrossed act in the office of the secretary of state, and that it was a true copy thereof. On defendant's objection to its incompetency, the copy was excluded and exception saved. But the proof or authentication of the copy was so clearly insufficient that we may dismiss it with its statement: Comp. Laws, sec. 5302; Wharton on Evidence, sec. 305.

The court found that the sheriff's affidavit of sale was entirely void, because the jurat was made by a party not authorized to administer oaths. But whether or not the court considered the record of such an instrument necessary to establish a record title ³⁵⁴ under the foreclosure is not apparent. Nor is it necessary for us to pass upon the point. The court held that the sheriff's deed made pursuant to the certificate of sale, and made to the Globe Investment Company, was ineffective to convey any title whatever, because the certificate was made to the Dakota Mortgage Loan Corporation as purchaser, and the Globe Investment Company in no manner connected itself with the rights or interests of the Dakota Mortgage Loan Corporation under the certificate. If plaintiff's grantor had no title, it, of course, conveyed none to plaintiff; and that point alone, if well taken, would decide the case. Against this position, it is urged that the recitals in the deed are sufficient prima facie to establish the right of the Globe Investment Company to succeed to the interests of the Dakota Mortgage Loan Corporation. We think otherwise. The statute does not make the sheriff's deed evidence of any such recitals: See Comp. Laws, secs. 5160, 5428, 5437. Nor would such recitals be evidence of the matters stated in the absence of

statutes. In *Costello v. Burke*, 63 Iowa, 361, the court said: "The conveyances introduced show that John Bannington was vested with the title, and there is no competent evidence that it has ever passed from him. The recitals in the deed to Costello that the grantors therein are the heirs at law of John Bannington, deceased, are not competent evidence, either of his death or their heirship. These recitals are no part of the conveyance, and they are no more competent as evidence of the facts stated than they would be if embodied in any other writing signed by the parties": See, also, *Hill v. Draper*, 10 Barb. 454; *Smith v. Penny*, 44 Cal. 161; *Hardenburgh v. Lakin*, 47 N. Y. 109; *McMurtry v. Keifner*, 36 Neb. 522. This is not a case where the truth of the matter contained in the recitals comes in question between the parties to the deed. Here it is sought to bind a third party, and, under the authorities, it is clear this cannot be done.

But by section 5423 of the Compiled Laws, it was made the duty of the officer who made the sale, or his successor in office, in case no redemption was made, "to complete the sale by executing a deed of the ³⁵⁵ premises to the original purchaser, his heirs or assigns, or to any person who may have acquired the title and interest of such purchaser, by redemption, or otherwise." Under the presumption that a public officer has done his duty, we are asked to assume, without proof, that in this case the sheriff executed the deed to the party to whom the law made it his duty to execute it; i. e., to the party that had legally succeeded to the interest of the Dakota Mortgage Loan Corporation. To state the position baldly: Where, upon a foreclosure by advertisement, the sheriff executes a certificate of purchase to A, and subsequently executes a deed of the premises to B, does the law presume, without proof, that B has legally succeeded to the rights of A? This must be answered in the negative. The authority to execute the deed to B depends, not upon the performance of any precedent duty on the part of the officer, but upon the existence of an entirely independent fact, and a fact that is jurisdictional, because, unless A's rights have in some manner passed to B, the officer is entirely without authority to deed to B. Now, the presumption in favor of the legality of official acts never goes to the extent of supplying a jurisdictional fact: *Wharton on Evidence*, sec. 1318; *Miller v. Brown*, 56 N. Y. 383; *Jewell v. Van Steenbrugh*, 58 N. Y. 85, 92; *Wheeler v. Mills*, 40 Barb. 644; *Albany v. McNamara*, 117 N. Y. 168; *Hilton v. Bender*, 69

N. Y. 75, 83; *Osborne v. Tunis*, 25 N. J. L. 633-662; *Telfener v. Dillard*, 70 Tex. 139; *Keane v. Cannovan*, 21 Cal. 291; 82 Am. Dec. 738.

For a further reason, we do not think plaintiff is in position in this case to claim the benefit of the usual presumption that a public officer has done his duty. Our statute providing for these sales (Comp. Laws, sec. 5416) declares that they must be made by the person appointed for that purpose in the mortgage, or by the sheriff of the county, or his deputy. Making the sale is not a duty that necessarily pertains to the sheriff's office. The duties of a sheriff, aside from his general duties as a peace officer, are those of chief executive officer of courts of record. Judicial sales are necessarily made by a sheriff, unless, by special order, some other ³⁵⁶ party is empowered to make the sale. But a sale under a power contained in a mortgage, when foreclosed by advertisement, is not a judicial sale. It is a sale in pursuance of a contract, and the contracting parties may appoint in the mortgage whom they will to act as their agent in conducting the sale. But, if they fail to appoint, then the law selects for that purpose the sheriff of the county, or his deputy. And, in making the sale, the appointee of the law acts in the same capacity as would the appointee of the parties in performing the same service, i. e., as the agent of the parties. His appointment is for a special purpose, and the legal presumption that we are discussing does not cover such a case: *Throop on Public Offices*, sec. 560, and cases cited; *Murphy v. Chase*, 103 Pa. St. 260; *Keane v. Cannovan*, 21 Cal. 291; 82 Am. Dec. 738; *Mechem on Public Offices*, 581. It is very clear that plaintiff failed to establish any title whatever in himself. Defendant's title need not be considered.

Judgment affirmed.

All concur.

SHERIFF'S DEEDS—RECITALS IN AS EVIDENCE.—Recitals in a sheriff's deed as to his acts are prima facie evidence of the facts recited: *Farrior v. Houston*, 100 N. C. 369; 6 Am. St. Rep. 597, and note; *Hardin v. Cheek*, 3 Jones, 135; 64 Am. Dec. 600, and note.

EVIDENCE—PRESUMPTION AS TO LEGALITY OF OFFICIAL ACTS.—In the absence of any showing, it is presumed that a public officer's action is correctly taken, and that he has complied with all the requirements of the law: *Leonard v. Sparks*, 117 Mo. 103; 38 Am. St. Rep. 646, and note.

EVIDENCE — PRESUMPTION THAT OFFICER HAS DONE DUTY.—If the legality of the acts of a public officer are questioned collaterally, he is presumed to have done his duty: *Hogue v. Corbit*, 156 Ill. 540; 47 Am. St. Rep. 232, and note; note to *Leonard v. Sparks*, 38 Am. St. Rep. 655, where the cases are collected.

TYLER v. SHEA.

[4 NORTH DAKOTA, 377.]

APPEAL—WAIVER OF.—One cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by the reversal of the judgment.

RIGHT OF APPEAL IS NOT WAIVED by accepting a benefit under a judgment which the appellate court has power to modify, so as to make it more favorable to the appellant, without reversing or modifying that part of it in his favor, and of which he has secured the benefit. In such case, the appeal can be taken only from the adverse portion of the judgment.

APPEAL, WAIVER OF.—One who appeals from an order refusing an execution to put him in possession of land, on the ground that defendants are in default, waives his right to appeal for a new trial in the appellate court, from a prior judgment declaring that such defendants are entitled to a deed of the land from him, on payment of a certain amount of money within a specified time, and that such appellant shall be immediately entitled to exclusive possession of the land, in case of their default.

APPEAL—QUESTIONS CONSIDERED.—If a party appeals for a new trial of the case in the appellate court, the whole case is open to investigation, and not merely that part of the judgment adverse to the appellant.

JUDGMENTS—MODIFICATION.—A court of equity may, in furtherance of justice, modify a judgment in a matter relating, not to the merits of the case, but solely to the mode of carrying out the decision of the court.

JUDGMENTS — MODIFICATION — EXTENDING TIME OF PAYMENT.—A judgment prescribing a time within which money must be paid to one party to entitle the other party to the benefit of the judgment, may, in furtherance of justice, be modified by the court, after the expiration of such time, by extending the time for payment, and providing that it may be made to the clerk of the court for the benefit of such former party.

Newman, Spaulding & Phelps, for the appellant.

W. E. Purcell, for the respondents.

380 CORLISS, J. We have two appeals before us in this case; one is from the judgment, and the other from an order made after judgment. The plaintiff is appellant in both appeals. The action was instituted to recover possession of certain real estate. The defense was, that the plaintiff had agreed to sell this land to Edward A. Schram, and that Schram had not made default in performing his contract, but had at all times been, and his heirs still were, willing and able to perform the same; and the prayer of the answer was, that plaintiff might be decreed to convey the land according to the contract, on performance of the covenants and agreements on the part of Edward Schram by his heirs. The defendants are the administrator and the two heirs at law and next of kin of Edward Schram. The

trial resulted in a judgment in favor of defendants, adjudging that they were entitled to a deed of the premises in question, upon making a certain payment, and on executing and delivering a note and a mortgage on the land, to secure the balance of the purchase price, to plaintiff, or upon paying the whole of such purchase price to plaintiff, provided either was done within ninety days after the date of the judgment. It was further adjudged that the plaintiff should, in that case, execute and deliver to defendants a warranty deed of the property; but that, in the event of the failure of defendants to comply with either one of these provisions within ninety days, the plaintiff should immediately thereafter become entitled to the ³⁸¹ exclusive possession of the land, and the defendants would thereafter be forever barred from any right thereto or interest therein. Subsequently to the rendering of this judgment, and after the period of ninety days has elapsed, the plaintiff, claiming that defendants had failed to comply with the provisions of the decree to be performed on their part, applied to the court, on notice, for an order that execution issue to put him in possession of the property. This application was denied, and, from the order denying the same, plaintiff has appealed. He has also appealed from the judgment, and asks for a new trial of the case in this court under the act of 1893, chapter 82. Before arguing on the merits the appeal from the judgment, respondents moved to dismiss the appeal, on the ground that appellant had availed himself of a right conferred on him by this judgment, and had thereby waived his right to appeal from the judgment.

The rule is well settled that one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by the reversal of the judgment: See cases in note to *Clark v. Ostrander*, 13 Am. Dec. 550; *Smith v. Coleman*, 77 Wis. 343; *Murphy v. Spaulding*, 46 N. Y. 556; *Bennett v. Van Syckel*, 18 N. Y. 481; *Knapp v. Brown*, 45 N. Y. 208; *Laird v. Giffin*, 84 Wis. 286; *Portland Construction Co. v. O'Neil*, 24 Or. 54; *Flanders v. Merrimac*, 44 Wis. 621; *Webster-Glover etc. Mfg. Co. v. St. Croix County*, 71 Wis. 317; *Independent Dist. of Altoona v. District Tp. of Delaware*, 44 Iowa, 201; *Corwin v. Shoup*, 76 Ill. 246; *Holt v. Reid*, 46 Ill. 181; *Bolen v. Cumby*, 53 Ark. 514; *Alexander v. Alexander*, 104 N. Y. 643. We must be careful not to ignore an important qualification of the general doctrine. Where the reversal of the judgment cannot possibly affect the

appellant's right to the benefit he has secured under the judgment, then an appeal may be taken, and will be sustained, despite the fact that the appellant has sought and secured such benefit. To illustrate ³⁸² this doctrine, we may instance the case of an action to recover one thousand dollars, in which the only defense is a counterclaim for five hundred dollars. It is obvious that five hundred dollars of plaintiff's claim is admitted. If the defendant succeeds in establishing his counterclaim, thus reducing plaintiff's recovery to five hundred dollars, the plaintiff may collect the five hundred dollars awarded to him by the judgment, and still appeal from such judgment to secure a reversal, to the end that he may defeat the counterclaim and recover judgment for his entire demand on a new trial. The five hundred dollars he is entitled to absolutely. The reversal of the judgment and the second trial of the case cannot impair his right to it. Accepting this sum is, therefore, not inconsistent with his attempt to reverse the judgment, that he may on a new trial recover more. He can never recover less. It is the possibility that his appeal may lead to a result showing that he was not entitled to what he has received under the judgment appealed from that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from. The following decisions enforce this doctrine: *Reynes v. Dumont*, 130 U. S. 354-394; *Embry v. Palmer*, 107 U. S. 3; *Higbie v. Westlake*, 14 N. Y. 281; *Mellen v. Mellen*, 137 N. Y. 606; *Cocks v. Haviland*, 7 N. Y. Supp. 870; *Portland Construction Co. v. O'Neil*, 24 Or. 54; *Morriss v. Garland*, 78 Va. 215; *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557; *Dudman v. Earl*, 49 Iowa, 37. The case of *United States v. Dashiell*, 3 Wall. 688, belongs to this class. The reasoning of the opinion delivered in denying the motion to dismiss is unsatisfactory in its statement of the grounds on which the decision rests, but, when we turn to the opinion of the court on the merits (*United States v. Dashiell*, 4 Wall. 182), we discover that the defendant did not dispute his liability for the amount for which judgment was rendered against him, but only with respect to the balance of the claim; his defense as to such balance being, that the money was stolen from him, and that, therefore, he was not accountable for it to the government, whose money it was, in his custody as paymaster in the army of the United States. The ³⁸³ judgment was rendered for this amount not in dispute, and a portion of it was collected before the writ of error was sued out. The motion to dismiss was properly denied, because the reversal of the case

could not affect plaintiff's right to what it had collected. Defendant conceded that so much was due. Again, cases will arise—they have arisen—in which the appellant has the right to ask for a more favorable judgment in the appellate court without having the case sent back for a new trial, on which, of course, the whole matter would be open again for investigation, which might result in a judgment not so favorable to plaintiff, or even one that would be adverse to him. In the class of cases in which a new trial of the whole case may result from the appeal, the element does not exist that exists in the one we have already alluded to. No portion of plaintiff's claim is admitted. Everything is in controversy. Under such a state of the pleadings, it is obvious that a reversal of the judgment and a new trial may result in a decision showing that the plaintiff was not entitled to what the former judgment gave him. In such a case, the plaintiff cannot accept what that judgment gives him, and then, by appeal, pursue a course which may overthrow the right of which he has availed himself. But if it is possible for him to obtain a more favorable judgment in the appellate court without the risk of a less favorable judgment from a new trial of the whole case there or in the lower court, then the acceptance of what the judgment gives him is not inconsistent with an appeal for the sole purpose of securing, without retrial of the whole case, a decision more advantageous to himself. There are several cases in which this doctrine has been enforced, and others in which it has been recognized: *Monnet v. Merz*, 17 N. Y. Supp. 380, affirmed in 131 N. Y. 646; *Clowes v. Dickenson*, 8 Cow. 328, as explained in *Knapp v. Brown*, 45 N. Y. 208; *Tarleton v. Goldthwaite*, 23 Ala. 346; 58 Am. Dec. 296; *Inverarity v. Stowell*, 10 Or. 261.

If appellant could have appealed from only that portion of the judgment which was favorable to the defendant, to secure a modification of the judgment in this respect, he might, with much ³⁸⁴ force, have claimed that he had done nothing inconsistent with an appeal for this specific purpose. He might have well asserted that he had only sought to take advantage of that portion of the judgment which contingently gave him the right to possession, and that, by his appeal, he was merely seeking such a modification of the judgment as would give him that right absolutely, not fettered by conditions—not postponed as to its enjoyment. If we were at liberty to treat this as the full scope of his appeal, we might entertain it for the sole purpose of ascertaining whether the court had not erred in giving the defendants any rights in the land in controversy, and, in case we should

reach that conclusion, we would then modify the judgment by expunging therefrom all provisions relating to any matters save the right of the plaintiff to the immediate possession thereof as the owner of the legal and equitable title to the same. But the terms of the act under which the appeal is taken will not permit our mere modification of the judgment appealed from. We are required by this law to try the case anew upon the same record, and to render final judgment in the action. It is true that we might render judgment in favor of the appellant absolutely, but it is equally true that we might conclude that the trial court was right, and, in giving judgment on this theory of the case, we could fix a new time within which defendants might, by payment, secure the title. Should we decide that defendants were not in default in performing the contract, we would afford them an opportunity, within a reasonable time after the entry of our judgment, to obtain the title. The appellant sought to secure possession within ninety days after the entry of the judgment appealed from. Should we fix a new time within which defendants might secure the title, and during which appellant could not have possession, it would then be clear that the appellant had sought to obtain a benefit under the judgment which his own appeal would overthrow, so far as relates to the matter of time. Can a party seek to avail himself of the benefit of a clause in a judgment giving him possession of land, after certain time has elapsed, and yet, by appeal, ask for a new trial of ³⁸⁵ the case, which may result in a decision that he was not entitled to possession at the time he sought to obtain it? We are clear that he cannot. The appellant could not ask for a new trial of the case with reference to those provisions of the judgment which were against him, and at the same time insist that the balance of the judgment favorable to him should stand without investigation. When a case is appealed for a new trial, the whole case is open for judicial inspection; and the decision upon such new trial must necessarily be founded upon an examination of the case as broad as that made by the lower court. When a party, who has been defeated as to a portion of his claim in a justice's court, appeals for a new trial in the district court, he cannot there insist that the judgment, in so far as it is favorable to him, shall stand, and only the balance of the case be litigated. The whole case is to be tried anew, and in that trial he runs the risk of losing that which the justice's judgment gave him. Where the claim is indivisible, and is all in dispute, the appeal for a new trial gives the defendant the same right to be heard on the whole case which

it gives to the plaintiff who appeals. In such a case, the ordinary rule, that the respondent cannot complain of those portions of the judgment which are against him, or, indeed, of any portion of the judgment, does not apply, because the appellant, by the nature of the relief he seeks by his appealing for a new trial, opens up the entire case to a second investigation. Indeed, there is high authority for the doctrine that such an appeal, of itself, supersedes the judgment appealed from, and annuls it as effectually as though a new trial had been granted by the court in which it was rendered. These authorities hold that the appeal places the case in the same position as though it had never been tried. The judgment no longer exists for any purpose: *Bank of North America v. Wheeler*, 28 Conn. 433; 73 Am. Dec. 683; *Curtiss v. Beardsley*, 15 Conn. 518; *Campbell v. Howard*, 5 Mass. 376; *Sharon v. Hill*, 26 Fed. Rep. 337-345; *Earl v. Hart*, 89 Mo. 263; *Burns v. Howard*, 9 Abb. N. C. 321; *Yeaton v. United States*, 5 Cranch, 281; *State v. Forner*, 32 Kan. 281.

³⁸⁶ Whether, in view of other provisions of our statutes, an appeal for a new trial in this court, under the act of 1893, annuls the judgment appealed from, when the appeal is taken or when final judgment is rendered in this court, we need not now determine. Neither do we wish to be understood as holding that this act is constitutional. Its validity has not been challenged in this case, and we therefore refrain from determining that question, not having the aid of the research and argument of counsel on that point. We believe that both precedents and principle fully sustain our view, that appellant has waived his right to appeal for a new trial if he has, in fact, accepted some benefit under the judgment: *Alexander v. Alexander*, 104 N. Y. 643. See, also, the cases first cited in this opinion.

But it is urged that appellant did not waive his right to appeal, because he did not, in fact, secure possession of the land. His application for an order that execution issue to put him in possession was denied. This contention does not meet the question. The appellant waived his right to appeal, if he obtained any benefit under the judgment which, on the appeal, may be taken from him. He applied for an order that an execution might issue to put him in possession. Whence did he derive the right to make this application, if not from a judgment? Was it not a valuable right—the right to be heard whether he should have the benefit of that portion of the judgment which was favorable to him? Was not that right exercised by him? Is he not still exercising it by appealing to this court from the order denying his application for an execution? He enjoyed in the court below, and is

enjoying in this court, a right under this very judgment which he is appealing from. Were it not for this judgment, he would have nothing to hang a hope upon; he would not be here with his appeal from the order. The judgment gave him a right to be heard whether an execution should issue. It is a valuable right. It is one he could not have exercised without the judgment, and he has enjoyed the benefit of it. The inconsistency of ³⁸⁷ these two appeals is apparent, when we consider that we might, if we entertained them both, hold, on the appeal from the order, that the appellant was entitled to execution when he applied for it, and at the same time hold, on the appeal from the judgment, that the defendant should have ninety days after the rendition of the judgment in this court in which to make the necessary payments to secure title, and that during that time the appellant should not have possession. We have no doubt that the appellant accepted such a benefit under the judgment as precludes his right to appeal from it, the benefit being one which his appeal from the judgment might show he was not entitled to: *Murphy v. Spaulding*, 46 N. Y. 556; *Bennett v. Van Syckel*, 18 N. Y. 481; *Garner v. Garner*, 38 Ind. 139; *Sims v. Lawes*, 22 La. Ann. 105. The appeal from the judgment is therefore dismissed.

This leaves the appeal from the order to be considered. The judgment directed that the money should be paid, and the note and mortgage should be delivered, to the plaintiff within ninety days from the date of the decree; and that, in case the defendants should fail to make such payment and delivery to the plaintiff, the latter should thereafter immediately become entitled to the exclusive possession of the land, and all rights of the defendants therein be forever barred. It is obvious that the judgment was not complied with according to its letter. The money was not paid to plaintiff, nor were the note and mortgage delivered to him. The payment and delivery were made to the clerk of the court. We are clear that this was not a compliance with the decree. So long as this decree remains unmodified, the plaintiff is entitled, upon these facts, to an order awarding him execution to put him in possession of the land. But, after careful investigation, we have reached the conclusion that the district court had power, and still has power, to modify its decree in the interests of justice, by extending the time in which this money may be paid and the note and mortgage delivered, or by authorizing the payment and delivery to be made to the clerk of the court. This latter is the usual practice, as it provides a common place ³⁸⁸ in court where the provisions of the decree may be carried out. It is quite customary, in cases like this, to declare that the

deed, properly executed, shall be delivered to the clerk within a specified period, and that the other party shall pay his money and deliver his papers to the clerk within a certain other period; and that, upon receipt by the clerk of such money and papers, he shall deliver the deed and turn over to the other party the money and securities delivered to him; and that, in the event of the failure of the party to pay such money and deliver such securities within the prescribed time, he shall be barred of all rights in the property, and that the deed delivered to the clerk shall be restored to the grantor therein, and that he shall be given possession of the property. On the motion for an order for execution, the district court had power to modify its judgment in this way, and still has such power; or it might have modified the judgment by extending the time within which such payment and delivery of papers might be made. Such modification would not, in any manner, affect the merits of the case. The judgment would stand just as before, except with respect to a matter wholly within the discretion of the trial court—the question of time, or the question of mode of carrying out the decision of the court—which decision was, in substance, that defendants might secure the legal title by paying certain money and executing and delivering certain papers. The decision of the court on the merits would be entirely undisturbed by such modification. The fact would still remain that defendants could secure the land by making a certain payment, and by securing the balance of the purchase price, and in no other way, just as much after such modification as before. This portion of the judgment, which we hold may be modified, never rests upon evidence, in the sense that the evidence in the case controls these questions. They are determined by the court without reference to the evidence, being only questions of the mode of carrying out the decision of the court upon the merits. Having decided that the defendants were entitled to a conveyance of the land upon making a certain payment, and ~~and~~ executing and delivering certain papers, the question of time, and the question touching the manner of making payment and delivery, rested in the sound discretion of the trial court, unaffected by the evidence in the case. That courts of equity may, with respect to such matters, modify their decrees in furtherance of justice does not admit of doubt; and we cannot conceive of a case calling more urgently for the exercise of this beneficent power than the case now before us. The defendants, within the ninety days, paid the money and delivered the papers to the clerk of the court, and notified plaintiff of that fact, and

plaintiff received this notice before the ninety days had expired. It would be a reproach to a court of equity if it had no power to relieve against a failure to comply strictly with a decree in a matter relating, not to the merits of the case, but solely to the mode of carrying out the decision of the court upon the merits. The authorities fully sustain our conclusion that this power of modification exists: 2 Daniell's Chancery Pleading and Practice, 3d Am. ed., 1017, 1018; Rauth v. Railroad Co., 23 N. Y. Supp. 750; Conklin v. Railroad Co., 13 N. Y. Supp. 782. See, also, Hatch v. Central Nat. Bank, 78 N. Y. 487; New York Ice Co. v. Northwestern Ins. Co., 23 N. Y. 357; Clark v. Hall, 7 Paige, 382; Adams v. Ash, 46 Hun, 105; Freeman on Judgments, sec. 70; Genet v. Delaware etc. Canal Co., 113 N. Y. 475; Jones v. Davenport, 45 N. J. Eq. 77. In Rauth v. Railroad Co., 23 N. Y. Supp. 750, the court, by order, extended the time within which the decree required money to be tendered, and subsequently modified the decree again by an order directing the payment of the money into court. In Conklin v. Railroad Co., 13 N. Y. Supp. 782, the court extended the time within which to deliver a deed as fixed by the decree, after the time had expired. In answer to the application for the order awarding execution, defendants might have applied for a modification of the decree. Had this been done, and the judgment been modified by extending the time, or by directing the payment and delivery to be made to the clerk of the court, the motion must have been denied, and, ~~and~~ on appeal, we would have affirmed the order so modifying the decree. But nothing of this kind was done. So long as the decree stood as originally rendered, plaintiff was entitled to the order prayed for. We therefore reverse the order denying the application for an order directing the issue of an execution to put plaintiff in possession of the premises, but we do not direct the granting of such an order. We merely leave the motion in the same position in which it was before it was decided, thus affording the trial court an opportunity to determine whether it will modify the judgment as suggested. The trial court will take such action upon the application for the order for execution, not inconsistent with this opinion, as to the court shall seem to be most conducive to justice.

The appeal from the judgment is dismissed, and the order is reversed.

All concur.

APPEAL.—Waiver of by accepting benefits under the judgment is discussed in the extended note to *Clark v. Ostrander*, 13 Am. Dec. 548.

APPEAL—WHAT CONSIDERED ON.—An appeal may be taken from part of a judgment under a statute authorizing an appeal from a judgment or any part thereof: *Bank v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461. When a judgment is not an entirety, and is good in part, but erroneous in part, it will, on appeal, be set aside only as to the erroneous part, where the two parts are separable: *Clyma v. Kennedy*, 64 Conn. 310; 42 Am. St. Rep. 194. In *Tarleton v. Goldthwaite*, 23 Ala. 346, 58 Am. Dec. 296, it was held that if a judgment at law is reversed, it abrogates the whole judgment, and places the parties to the action in a position as if the judgment had never been rendered.

PARSONS v. VENZKE.

[4 NORTH DAKOTA, 452.]

PUBLIC LANDS—CANCELLATION OF ENTRIES.—The commissioner of the general land-office has power, generally, to cancel entries for public lands. Such power is not arbitrary or unlimited, and must be exercised according to law.

PUBLIC LANDS—CORRECTION OF MISTAKE IN CANCELLATION OF ENTRY.—If the commissioner of the general land-office has been induced, by fraudulent misrepresentations, or by material mistake of fact, to cancel an entry for public lands, or if he has exercised the power of cancellation in violation or in disregard of law, the results so produced may be so modified by courts of equity that those entitled to the titles to the lands may ultimately obtain them.

PUBLIC LANDS—CORRECTION OF MISTAKE IN CANCELLATION OF ENTRY.—If the commissioner of the general land-office cancels an entry for public lands under a misconception of the law, the courts may rectify the error, and give the land to the one who would have received the patent if the mistake had not been committed.

PUBLIC LANDS.—DECISIONS OF THE GENERAL LAND DEPARTMENT on questions of fact involved in the cancellation of entries for public lands are binding on the courts, if the parties have been heard, or have had an opportunity to be heard.

PRACTICE.—IF SPECIAL APPEARANCE TO OBJECT TO JURISDICTION is, after the objection is overruled, followed by a general appearance, the question of jurisdiction is not open to collateral attack.

PUBLIC LAND—CANCELLATION OF ENTRY—PRESUMPTION.—The courts presume that the commissioner of the general land-office, in canceling an entry for public land in an *ex parte* proceeding, has properly exercised his power, and the entryman must prove the contrary, and that he has acted in good faith and fully complied with the law, to entitle him to the patent to the land.

PUBLIC LANDS—EX PARTE CANCELLATION OF ENTRY.—The fact that the proceedings for the cancellation of an entry for public land have been *ex parte*, does not entitle the entryman to relief, unless he was entitled to a patent at the time of the cancellation of the entry.

PUBLIC LANDS—CANCELLATION OF ENTRY—NOTICE OF HEARING.—Failure to require the filing of an affidavit that the party to be served with notice of the cancellation of an entry for public lands cannot be personally served, is not fatal to the power of the land department to act, upon publication of such notice, without personal

service, provided such party has knowledge of the hearing and an opportunity to be heard.

PUBLIC LANDS.—COURTS DO NOT DISTURB THE DECISIONS OF THE COMMISSIONER of the general land-office in canceling an entry for public land on account of errors relating to the burden of proof, the competency or weight of evidence, when full opportunity to be heard has been given the entryman.

PUBLIC LANDS—CANCELLATION OF ENTRY—RIGHTS OF BONA FIDE PURCHASER.—The power of the commissioner of the general land-office to cancel an entry for public land is not affected by the transfer or mortgage of the land to one who, in good faith, parts with value, without knowledge of the facts causing the cancellation of the entry.

J. E. Robinson and S. B. Pinney, for the appellant.

S. H. Snyder and C. Sweigle, for the respondent.

⁴⁵⁶ **CORLISS, J.** The plaintiff's theory of action, as disclosed by his complaint, is not the one that was developed upon the trial. The complaint is framed under section 5449 of the Compiled Laws, to try an adverse claim to plaintiff's alleged title. The pleading contains an allegation that the plaintiff is the owner in fee simple of the land in question. On the trial, it appeared that the plaintiff was not the owner in fee simple; that he did not pretend to hold the legal title; but that, on the contrary, he was seeking by this action to have the defendant, who held the legal title, adjudged to be a mere trustee for the plaintiff as to such title, and to procure a decree directing defendant to convey the same to the plaintiff. The pleadings and the proof are not in harmony; but, as no point has been made touching the failure of the plaintiff to establish the cause of action he had alleged, we will consider the pleadings as amended to conform to the evidence, and turn to the latter for our guidance in determining whether the theory on which the case was tried below and argued in this court can be sustained.

The defendant holds a patent for the land. The plaintiff claims under a pre-emptor whose certificate was canceled by the commissioner of the general land-office before defendant made the entry on the land under which he obtained his patent. The question which confronts us at the very threshold relates to the power of the commissioner to cancel entries which have been allowed by the officers of the local land-office. In this connection, a more particular reference to the facts is advisable. The entry under which plaintiff claims was made by Willis B. Simpkins, January 11, 1883. In less than a month after he had received his patent certificate, he conveyed the land to Charles J. Wolfe, who sold the land to Jessie J. Russell, by whom it was mortgaged. The plaintiff claims as a purchaser under the sale

on foreclosure of this mortgage. These transfers and this mortgage were all executed prior to the cancellation of Simpkins' entry. After the cancellation of this entry, the defendant entered the land as a pre-emptor, and ultimately obtained a patent. It is the legal title under this patent which the plaintiff seeks to secure by this ⁴⁵⁷ action. If he is correct in his premise, that the commissioner had no power to cancel the entry, or, assuming his power, that we can inquire whether it was properly exercised in this case, and from that inquiry conclude that it was not properly exercised, then it follows that the defendant must be deemed to hold the legal title in trust for him, and ordered to convey such title to him. Said the United States circuit court of appeals in a recent case: "No principle is more firmly established in American jurisprudence than that, after the title has passed from the United States to a private party, it is the province of the courts to correct the errors of the officers of the land department which have resulted from fraud, mistake, or erroneous views of the law; to declare the legal title to the lands involved to be held in trust for those who have the better right to them; and to compel their conveyance accordingly": *Bogan v. Edinburgh etc. Mortgage Co.*, 11 Co. Ct. App. 128; 63 Fed. Rep. 192 To same effect, see *Bernier v. Bernier*, 147 U. S. 242; *Silver v. Ladd*, 7 Wall. 219; *Johnson v. Towsley*, 13 Wall. 72.

The first inquiry is, whether this power of cancellation exists. The authorities are divided upon this question, but the great weight of the adjudications supports the power, and so does the better reason: *Holmes v. State*, 100 Ala. 291; *Judd v. Randall*, 36 Minn. 12; *American Mortgage Co. v. Hopper*, 56 Fed. Rep. 67; *Lewis v. Shaw*, 57 Fed. Rep. 516; *Jones v. Meyers*, 2 Idaho, 793; 35 Am. St. Rep. 259; *Swigart v. Walker*, 49 Kan. 100; *United States v. Steenerson*, 1 Co. Ct. App. 552; 50 Fed. Rep. 504; *Stimson v. Clarke*, 45 Fed. Rep. 760; *Bogan v. Edinburgh etc. Mortgage Co.*, 63 Fed. Rep. 192; *Freese v. Scouten*, 53 Kan. 347; *McLane v. Bovee*, 35 Wis. 27; *Vance v. Kohlberg*, 50 Cal. 346; *Hosmer v. Wallace*, 47 Cal. 461; *Figg v. Hensley*, 52 Cal. 299; *Fernald v. Winch*, 50 Kan. 79; *Bellows v. Todd*, 34 Iowa, 18, 31. See, also, *Harkness v. Underhill*, 1 Black, 316-325; *Barnard v. Ashley*, 18 How. 43; *Cornelius v. Kessel*, 128 U. S. 456-461. The argument employed to assail the existence of the power begs the whole question. It necessarily assumes that the power does not exist. The argument, in substance, urges the ⁴⁵⁸ sacredness of vested rights. But if the statute,

when properly construed, vests the power of cancellation in the commissioner, it is idle to talk of vested rights which will interfere with the lawful exercise of this power. The government has not finally decided that the entryman is entitled to the land. The certificate merely evidences the fact that the local officers are satisfied that he has made out a good claim to the land. But if the commissioner has authority to investigate, and comes to a different conclusion, then the entryman has no vested rights which the commissioner takes away by canceling the entry. His claim is not vested, but contingent. Its validity depends upon its approval by the commissioner. If he disapproves it, it fails to become a vested right. The disapproval does not destroy; it merely prevents, with respect to the claimant, the existence of a vested interest in the land. Said the court in *American Mortgage Co. v. Hopper*, 56 Fed. Rep. 67-74: "There is no such thing as a forfeiture of the land, since the title does not vest until the final action of the land department determines the existence of the conditions necessary to that result. There is no such thing as a forfeiture of an equitable estate or interest, since, as has been abundantly shown, it does not appear that the original entryman was ever invested with any such estate or interest. The alleged forfeiture is merely the exercise of an undoubted authority, by the proper officers of the land-office, to cancel an entry made upon false testimony—an authority so exclusive in such department that what is done under it in the decisions of questions of fact cannot be questioned anywhere else, unless such tribunal has been prevented, by some fraud practiced, from fairly trying the question." The question is purely one of power, and it is illogical to argue against its existence by a line of reasoning which rests ultimately upon a denial of the power as the basis of such reasoning. The question of vested rights is foreign to the inquiry. If there is power, there can be no vested rights which can defeat its exercise. If there is no power, then the question of vested rights is of no possible moment, as the want of power will defeat its exercise without ⁴⁵⁹ the aid of further argument. We do not wish to be understood as ignoring the doctrine that the entryman secures such standing before the law that the commissioner cannot illegally or arbitrarily cancel the entry: *Johnson v. Towsley*, 13 Wall. 72-85.

The state of the record will not, however, permit us to rest here. It is contended that, even conceding the existence of this power, it was improperly exercised in this case. The general

doctrine is, that this power is not unlimited; that the courts will not always refuse to investigate the question whether it has been properly exercised. Said the court in *Bogan v. Edinburgh etc. Mortgage Co.*, 63 Fed. Rep. 192: "But the supervisory or reviewing power of the commissioner of the land-office or of the secretary of the interior is not an arbitrary, unlimited, or discretionary power, but a power that must be exercised according to law, and not in violation or disregard of it. When it is so exercised, and its exercise is not induced by fraud or mistake, the results it produces are sustained by the courts. Where its exercise has been induced by fraudulent misrepresentations or by material mistake of fact, or when the power has been exercised in violation or in disregard of law, the results produced are uniformly so modified by the decrees of the courts that those who are entitled in equity to the titles to the lands ultimately obtain them." To same effect are *Cornelius v. Kessel*, 128 U. S. 456; *Bernier v. Bernier*, 147 U. S. 242. It is well settled that, if the commissioner cancels an entry under a misconception of the law, the courts will rectify the error, and give the land to the one who would have received the patent if the mistake had not been committed. There are numerous cases in which this has been done: See, among others, the authorities last cited. But it is not pretended here that the cancellation of *Simpkins'* entry was the result of a mistake of law. The entry was canceled on the ground that it was fraudulent and speculative, and that *Simpkins'* final proof was false. These were all matters of fact. The commissioner having power to investigate them, and to reach a conclusion upon them, his decision is final, unless the case is ⁴⁶⁰ taken out of the ordinary rule by what are characterized as its exceptional features. It is one of the elements of the law that the decision of the land department on a question of fact is ordinarily binding on the courts: *Vantongerren v. Hefferman*, 5 Dak. 180, and cases cited; *Johnson v. Towsley*, 13 Wall. 72; *Quinby v. Conlan*, 104 U. S. 420; *Barden v. Northern Pac. R. R. Co.*, 154 U. S. 288; *Heath v. Wallace*, 138 U. S. 573; *Steel v. St. Louis etc. Refining Co.*, 106 U. S. 447; *Lee v. Johnson*, 116 U. S. 48. Many other authorities might be cited. The reasons for this rule are so obvious, and have been so often stated, that it would be a waste of time for us to allude to them.

Do the peculiar facts of this case take it out of this general rule? This brings us to a further consideration of the evidence. On September 13, 1884, W. W. McIlvain, special agent of the general land-office, made a report to that office, in which he stat-

ed that only six acres of the tract in question had been cultivated, and that this constituted all the improvements on the land; that he thought there had never been any actual residence established on the land; that the claimant was entirely unknown in the neighborhood; and that the entry must have been fraudulent. This report was supported by four affidavits. Simpkins' final proof was false, and his entry fraudulent, if these facts were true. On this report, the commissioner ordered a hearing before the local officers. A summons was issued and served by publication, the special agent certifying that the summons could not be personally served on Simpkins; that he was informed that Simpkins was not a resident of the territory; and that he believed that personal service could not be made upon him. It will be noticed that these facts were not sworn to, but were embodied in a mere certificate of the special agent. On the day set for hearing, S. B. Pinney appeared specially for Simpkins, and moved that the proceedings be dismissed, on the ground that there had been no legal service upon Simpkins. This motion was denied. Mr. Pinney was then notified by the receiver that he might and must ⁴⁶¹ offer any evidence he had to support the entry made by Simpkins. On demand of Mr. Pinney for a copy of the allegations which formed the basis of the order that a hearing be had, the receiver exhibited to him the letter of the commissioner, directing the local officers to order a hearing, which letter referred to the report of the special agent that the proof made by Simpkins was false and the entry fraudulent. Thereupon, Mr. Pinney insisted that the burden was on the government to offer evidence that the entry was fraudulent; and, the special agent having stated that he would offer no evidence, the case was closed, Mr. Pinney refusing to submit any evidence until the special agent should have introduced evidence on behalf of the government. The papers were then sent to the commissioner, who ordered, May 6, 1886, that the entry be held for cancellation. Mr. Pinney, still acting for Simpkins, then appealed to the secretary of the interior. His appeal was transmitted to the secretary of the interior, but was returned to the commissioner, with direction to follow general instructions of July 6, 1886 (5 Dec. Dept. Int. 149), which, in substance required that, in case of an appeal from the decision of the commissioner holding an entry for cancellation upon the report of a special agent, the commissioner should order a hearing, instead of transmitting the case to the secretary. A second hearing was ordered by the commissioner, but, before this hear-

ing took place, Mr. Pinney, representing the grantee, who then owned the property, and the mortgagee, who held the mortgage upon it which has since been foreclosed, applied for a certiorari to the commissioner, directing him to send up the papers on the appeal, instead of rehearing the case. This application was granted by the secretary. The papers having been transmitted to him, he held, on April 1, 1889, that the decision of the commissioner holding the entry for cancellation should be affirmed.

It is urged by plaintiff that the commissioner failed to acquire jurisdiction in the proceedings to cancel the entry, for the reason that the summons was not personally served, and that no affidavit for publication was ever made. The publication was made, as we ⁴⁶² have already stated, upon the mere certificate of the special agent. We are referred to a rule of the department requiring an affidavit in such cases. It is the same rule which is set forth in the opinion in *Risdon v. Davenport*, 4 S. Dak. 555. That case is cited as in point on this question. The rule is not pleaded, as it was in the South Dakota case; but it seems to be our duty to take judicial notice of the rules and regulations of the land department: *Caha v. United States*, 152 U. S. 211. In the South Dakota case, the failure to file an affidavit before publication is regarded as fatal to the jurisdiction of the commissioner, as in actions in courts of law. Even if we could assent to this view, it would not aid the plaintiff. After his special appearance had been overruled, Mr. Pinney, by his conduct, appeared generally. Thereafter the department was not without jurisdiction, although the error could have been taken advantage of within the department despite the general appearance. When a special appearance to object to jurisdiction is, after the objection is overruled, followed by a general appearance, the question of jurisdiction is not open to collateral attack: *Miner v. Francis*, 3 N. Dak. 549. The method of procedure in acquiring jurisdiction in cases where personal service cannot be made is prescribed by the legislature. The legislature having prescribed the particular mode of securing jurisdiction, the courts cannot change this mode or disregard it. But there is no limitation on the broad power of the commissioner to cancel entries, save that imposed by the courts. Congress has not fixed the rules of practice and limited the mode of procedure. Neither has the department imposed upon itself any restriction of its power. The rule in question emanates from the department, and is subject to its control. The department may abrogate it. The department may suspend its operation in a particular case, or disregard it. The courts will not arrogate

to themselves the right to compel obedience to a rule which the power that ignores it may at any time abolish. We must, however, not lose sight of the principle, that in disregarding its rules, the department must not act in an ⁴⁶³ arbitrary manner—must not deny to the entryman any right to be heard. This limitation upon its power is imposed by the courts, and, therefore, cannot be ignored by the department. Should one of the rules of the department lead to arbitrary action by it—should it result in a denial of a hearing—the courts would restore to the entryman the rights he had lost by such unfair procedure, culminating in the cancellation of an honest entry. But, when the department has failed to require compliance with its own rules, it would be an unbecoming interference with an independent branch of the government for the courts to assume to dictate to the department that it should obey its own regulations, which it might at any moment abrogate, the action of the department not being arbitrary in the particular case. The rule in question was disregarded by the local officers and by the commissioner, and their action was affirmed by the secretary of the interior. This was not fatal to the action of the department in canceling the entry, unless it resulted in an ex parte proceeding, in which the entryman had no chance to be heard, culminating in a cancellation of a bona fide entry. That it did not result in the denial of the right of the entryman to be heard is apparent from the evidence. On the day set for hearing, Mr. Pinney, representing the entryman, appeared specially, and objected to the proceedings, on the ground that no affidavit had been filed. This being overruled, he at first refused to offer any evidence until the charge had been exhibited to him; and, when he was shown this, he still declined to make any proof until the government should have offered evidence to impeach the entry. Simpkins at this time had ample chance to be heard. After the case had been sent to the commissioner, and the entry held for cancellation, he appealed to the secretary of the interior. Under the existing rules, it was, as we have already stated, the duty of the commissioner to order a hearing, instead of transmitting the papers to the secretary. This hearing was ordered, and would have been had, if Mr. Pinney had not applied for and obtained a certiorari, under which the papers were transmitted to the secretary. At ⁴⁶⁴ this time, Mr. Pinney represented Simpkins and his grantee and the mortgagee of such grantee. Here was a second opportunity to be heard—an opportunity afforded to all parties in interest. The department does not appear to have acted arbitrarily under these circumstances. On the application

to have the secretary order the papers sent to him, it is stated as a reason why this should be done, instead of another hearing being had before the commissioner, that only questions of law were raised by the appeal, and that it did not controvert the facts alleged against the entry, or allude thereto. Moreover, arbitrary action of the department in canceling the entry would not, of itself, entitle the plaintiff to the relief he seeks. He invokes equity to decree that he is in equity entitled to the legal title. His position is, that he had earned it, and that the government held it in trust for him, and that the government's grantees also holds it impressed with such trusts. It is not the certificate which entitles him to the legal title. The right to the title comes from compliance with the law. The certificate, so long as it stands, is evidence that the holder of it has complied with the law. When it is once set aside, it ceases to be of any value as evidence, and the party who claims the legal title because it was issued to him originally must show that he did, in fact, comply with the law, and that, because of the arbitrary action of the land department, he had no chance to establish that fact before the department.

Said the circuit court of appeals in *United States v. Steener-son*, 1 Co. Ct. App. 552, 50 Fed. Rep. 504, 509: "But if it appears in a given case that when, in the proper course of business, the commissioner of the land-office was called upon to determine whether the pre-emptor was entitled to a patent, he adjudged that the entry was fraudulent, and therefore void, then the claimant is without a final adjudication in his favor, and he must resort to other evidence to sustain his claim." In this very case, the proceedings to cancel the entry were *ex parte*, and yet the court ruled that this circumstance would not excuse the citizen from showing compliance with the law, after the evidence of such compliance had been ⁴⁶⁵ annulled. Said the court: "But it is equally true that such action of the commissioner, being practically *ex parte*, is not conclusive, and that it is still open to Hanson and his grantees to establish a right to the land, by proving a valid entry on his part, and performance by him of the acts required to complete a pre-emption entry." An *ex parte* cancellation may be in accordance with the facts. The courts do not decree that a person is entitled to the legal title merely on the ground that the cancellation of his entry was *ex parte*. If so, then a fraudulent entryman would secure the title merely because the department had not heard him when it canceled the entry. The commissioner having general power to cancel, the courts must assume that the power was not employed to the in-

jury of an innocent entryman. His right to be heard in the courts on the question of fraud when the proceeding is *ex parte*—a right recognized by *United States v. Steenerson*, 1 Co. Ct. App. 552, 50 Fed. Rep. 504-510—affords him ample protection. But, having no certificate with which to make out a *prima facie* case, he must resort to other evidence. Indeed, there is a strong intimation in this case that, as against the United States at least, he must offer other evidence when he claims the right to the legal title, not only when his entry has been canceled, but in all cases where he still holds the patent certificate. Said the court in that case: "The final certificate or receipt acknowledging payment in full, and signed by the officers of the local land-office, is not, in terms nor in legal effect, a conveyance of the land. It is merely evidence on behalf of the party to whom it is issued. In a contest involving the title to land, wherein a person claims adversely to the United States, it is open to such claimant, notwithstanding the legal title remains in the United States, to prove that, by performance on his part of the requisite acts, he has become the equitable owner of the land, and that the United States holds the legal title in trust for him; but, as the claimant in such case has not received a patent or formal conveyance, and has not become possessed of the legal title, he is required to show performance ⁴⁶⁶ on his part of the acts which, when done, entitle him, under the law, to demand a patent of the land." In *Swigart v. Walker*, 49 Kan. 100, the cancellation was made, on the ground that the entryman had previously made a similar entry in another state, and, therefore, had no right to make the second entry. The proceedings appear to have been *ex parte*. There was nothing in the findings of the court to show that there had been a hearing or any notice given, and yet the court ruled that it would be presumed that the cancellation was lawful. The court said: "We have no doubt of the power of the commissioner. It is not claimed to have been exercised erroneously or fraudulently, and, if he is warranted in taking such action in any case, it will be presumed to have been regularly and legally done in this case." In *Holmes v. State*, 100 Ala. 291, the court held that, after cancellation of an entry, the entryman must support his claim to a patent by other evidence, saying: "Although it is averred in the answer that respondent made the necessary permanent improvements, and continuously resided upon the land from the date of his entry (to wit, 1881) to April, 1884, when the same was commuted from a homestead entry to a cash entry, and the payment of the cash entry, there is no proof in the record of the truth of these averments, other

than such as may be inferred from the register's and receiver's certificate and receipt. The government had not issued to him a patent to the land; and, while the certificate and the receipt may have entitled him *prima facie* to the patent, they did not exclude the land department from investigating and determining the truth of the facts upon which the certificate and receipt were issued, and the *bona fides* of his homestead claim, and, if found fraudulent or untrue and insufficient, to cancel the same. The burden resting upon respondent in these respects has not been met or overcome."

In *Risdon v. Davenport*, 4 S. Dak. 555, the question arose upon the pleadings, the plaintiff having demurred to the answer. The defendant was the holder of a mortgage upon land, executed by the entryman whose entry had been canceled. Plaintiff held a patent under an entry made subsequently to such cancellation, ⁴⁶⁷ and was seeking by the action to have the mortgage annulled as a cloud on his title. He was thus attacking the validity of the canceled entry. The defendant set up that he had made a lawful entry, and that the same had been canceled without his being heard, and that the notice to him was not legal, for the reason that it was served only by publication, without any proof by affidavit that he could not be served personally. The court held that the answer set up a good defense. But it contained two elements which are lacking in this case. It was averred that the defendant was not heard. In the case at bar, the entryman and his grantee and mortgagee have been heard, or they had a chance to be heard. It appeared from the answer in that case, as the court construed it, that his entry was honest, and that he had complied with the law. If there was any evidence in this case showing that Simpkins made the entry in good faith, and had complied with the law, a different conclusion might be reached. The failure of Simpkins to offer evidence of these facts on the first hearing, the refusal of Simpkins and his grantee and the mortgagee of his grantee to take advantage of the second hearing, when such evidence might have been offered, electing to have the case reviewed on the record already made, and the utter absence of any evidence in this case as to these facts, are very persuasive indications that such facts could not be proved. If Simpkins was not a *bona fide* entryman, he could not have claimed the legal title, even though the cancellation of his entry had been made *ex parte*. By showing that he had no opportunity to be heard before the department, the entryman

makes out a case for a hearing in court; but, as he assumes the attitude of complaining of the action of the department, he must show that it operated to his prejudice. As he is in the position of claiming the legal title, he must prove, by evidence, that he has fully earned the same by an honest compliance with the law. The burden is on him, and it cannot be sustained without offering evidence in addition to the certificate and its ex parte cancellation. It is further urged that the local officers erred in requiring Simpkins to offer evidence to sustain ⁴⁶⁸ the entry before any evidence had been introduced by the government. But this was a matter for the decision of the department. The commissioner or the secretary might have held that this was error, and for that reason might have sent the proceedings back for further hearing. But they did not. They sustained the local officers. Assuming that they were wrong, their error cannot be collaterally reviewed by the courts. The decision of the land department on questions of fact properly before it is conclusive on the courts, and such department must necessarily settle for itself what rules of evidence it will accept and follow. The collateral attack and overthrow of a decision on a question of fact, because the tribunal making the decision erroneously shifted the burden of proof from the shoulders of one litigant to those of the other, has yet to find support in future adjudications. There is no authority for such doctrine up to the present date. Again, an entryman, until a patent has been issued to him, is in the position of a claimant. He is asking for a patent. True, the local officers had been satisfied with Simpkins' proof, but the commissioner also must be satisfied. May he not say to the claimant, "I have reason to believe that your entry is fraudulent, and I require further proof"? Moreover, there is no claim made that the entry was not fraudulent; nor is there any evidence on the point. This consideration, of itself, would, for the reasons already stated, be sufficient to defeat plaintiff's contention based upon the ruling of the department as to the burden of proof.

There is nothing in the point that there was no evidence before the commissioner that the entry was fraudulent; or, at least, no competent evidence. The courts cannot review the decisions of the land department on the ground that the evidence was insufficient, or that only incompetent evidence was before it. The power to try questions of fact necessarily embraces the power to pass upon the weight and competency of evidence.

There is much force in the decision of the court in *Lewis v. Shaw*, 57 Fed. Rep. 516, that a cancellation is a nullity as

against an ⁴⁶⁹ innocent purchaser, who is not heard, and who receives no notice of the proceedings, provided the entry was, in fact, an honest one, and the entryman actually complied with the law. Not having been offered an opportunity to be heard before the land department as to these matters of fact, may he not litigate them in an action brought to enforce his right to the patent? But in this case (*Lewis v. Shaw*, 57 Fed. Rep. 516) the innocent grantee did not stop with an allegation that he had not been a party to the cancellation proceedings, but averred that, as a matter of fact, the entry was honest, and in conformity with law. The question arose on demurrer to the bill, and the case before the court was one where there had been, as to the plaintiff, an *ex parte* cancellation of a valid entry. The allegation that he was not and had no chance to be heard furnished a foundation for his further averment that the entry was legal. In the absence of the prior allegation, the court must have adjudged that the question whether the entry was legal was not open to investigation, having been settled, so far as it depended on matters of fact, by the decision of the department: See *Barden v. Northern Pac. R. R. Co.*, 154 U. S. 288; *Smelting Co. v. Kemp*, 104 U. S. 651; *Steel v. St. Louis etc. Refining Co.*, 106 U. S. 450; *Heath v. Wallace*, 138 U. S. 573. After the litigant has shown that the decision ought not to be conclusive upon him, because he was not and could not be heard, or for some other equally valid reason, he must still prove that the entryman has complied with the law, and has acted in good faith, because such litigant is claiming that he has a right to the legal title, and these facts are indispensable to the maintenance of such claim. The certificate, being canceled, is no longer evidence of them. The case of *Lewis v. Shaw*, 57 Fed. Rep. 516, is not in point, for three reasons: 1. There is no evidence in the case at bar that the entry was in fact lawful and honest; 2. It is apparent, as we have already seen, that the owner, and also the mortgagee, of the property, at the time the cancellation proceedings were pending, had full opportunity to be heard in support of the entry; and 3. The want of jurisdiction, if any, was not cured in that case, ⁴⁷⁰ as it was in this, by a general appearance after the objection to the jurisdiction had been overruled. The case of *Stimson v. Clarke*, 45 Fed. Rep. 760, admits the power to cancel, and yet practically decides against the existence of such power. This decision must be placed in the list of the authorities which are in conflict with our decision. Among these cases are *Smith v. Ewing*, 23 Fed. Rep. 741, and *Wilson v. Fine*, 40 Fed. Rep. 52.

We now come to the last question in this case. There is evidence warranting the conclusion that the mortgagee to whom the land was mortgaged before these cancellation proceedings were instituted was a mortgagee in good faith, for a valuable consideration, and made the loan without notice or suspicion of any failure on the part of Simpkins to comply with the law, or of his fraudulent purpose in making the entry. The plaintiff, under the foreclosure, occupies the same vantage ground. Do these facts prevent a cancellation of the entry? We think not. Here, again, the cases disagree. But on this point, as on the general question of the power to cancel, the weight of authority, and we think the better reason, support our view: *Swigart v. Walker*, 49 Kan. 100; *Jones v. Meyers*, 2 Idaho, 793; 35 Am. St. Rep. 259; *Judd v. Randall*, 36 Minn. 12; *Figg v. Hensley*, 52 Cal. 299; *Fernald v. Winch*, 50 Kan. 79; *American Mortgage Co. v. Hopper*, 56 Fed. Rep. 67, 74, 75; *Lewis v. Shaw*, 57 Fed. Rep. 516; *Freese v. Scouten*, 53 Kan. 347. When the bona fide purchaser who holds the interest of the entryman at the time of the commencement of the cancellation proceedings is not heard, and has no chance to be heard, before the department, possibly the proceedings will be regarded as *ex parte* with respect to him, and he be allowed to prove in court the lawfulness of the entry: See *Lewis v. Shaw*, 57 Fed. Rep. 516. See, also, *United States v. Steenerson*, 1 Co. Ct. App. 552; 50 Fed. Rep. 504; *Lindsey v. Hawes*, 2 Black, 554; *Garland v. Wynn*, 20 How. 8; *Lytle v. Arkansas*, 22 How. 193. There is a strong disposition on the part of the courts to throw about the entryman, and those who claim under him, protection against arbitrary destruction of their rights: See *Cornelius v. Kessel*, 128 U. S. 461, in addition to the cases last above cited.

⁴⁷¹ It is urged that the act of March 3, 1879, has limited the power of the commissioner. That act merely provides that, before making final proof, the applicant shall file with the register notice of his intention to make such proof, stating therein the description of the land and the names of the witnesses by whom he will prove the necessary facts, and that thereupon the register shall publish for a period of thirty days a notice that such application has been made. After that final proof can be made. It is said that this gives notice to the world that the applicant claims that he has complied with the law, and is entitled to enter the land, and that thereupon the government must make its investigation before allowing the entry, and not after. But the government, before this act was passed,

was, in every case, apprised of the intention of the applicant to enter the land in time to investigate the facts before accepting final proof. Moreover, an investigation before entry will not always lead to a correct conclusion. Subsequent conduct may throw new light on the problem. The man who seemed honest on the day of entry may be shown by later developments to have been not a bona fide settler, but a mere speculator. This act possibly gave the government improved facilities for detecting fraud in advance; but no legislation could so improve them as to render subsequent investigation of no importance in the carrying out of the policy of preventing the acquisition of public lands by dishonest methods. It is a most extraordinary contention that this act, which in no manner alludes to the power of the commissioner, should be interpreted as abrogating this most valuable and even indispensable power of the commissioner to investigate the lawfulness of an entry after it has been allowed. We hold that the act of 1879 in no manner affects the commissioner's power to cancel an entry.

We are next referred to section 7 of the act of March 3, 1891, entitled, "An act for the repeal of the timber culture law, and for other purposes." That portion of section 7 which relates to this case provides as follows: "And all entries made under pre-emption, homestead, desert land, or timber culture laws, in which ⁴⁷² final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry, and which have been sold or encumbered prior to the first day of March, 1888, and after final entry, to bona fide purchasers, or encumbrancers, for a valuable consideration, shall, unless, upon investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or encumbrance. At the time this act became a law, the entry in question was not in existence. It was canceled several days before. The act does not relate to such entries. Secretary Noble so ruled in Case of Ross, 12 Dec. Dept. Int. 446.

The judgment is affirmed.

PUBLIC LANDS—CANCELLATION OF ENTRIES.—The land-office of the United States has the power to cancel all entries of public lands at any time before a patent issues thereon, on proof that the entryman has failed to comply with the law, and has procured his final receipt or certificate on false evidence: *Jones v. Meyers*, 2 Idaho, 793; 35 Am. St. Rep. 259, and note.

PUBLIC LANDS—DECISIONS OF GENERAL LAND-OFFICE—CONCLUSIVENESS OF.—State courts cannot interfere with or control the officers of the general government in the disposal of public lands: *Lewis v. Lewis*, 9 Mo. 182; 43 Am. Dec. 540. The decisions of land-officers are final and conclusive: *Boatner v. Ventress*, 8 Mart., N. S., 644; 20 Am. Dec. 286, and note. See, also, the notes to *Baty v. Sale*, 92 Am. Dec. 132; *Rogers v. Brent*, 50 Am. Dec. 434; *Brill v. Stiles*, 85 Am. Dec. 367.

CASES
IN THE
SUPREME COURT
OF
OREGON.

WIMER v. SIMMONS.

[27 OREGON, 1.]

WATERS—MEASURE OF APPROPRIATION.—It is the policy of the law that water of a stream shall be appropriated to the extent only that it is put to, or designed for, some useful or beneficial purpose. This is the measure of the appropriation.

WATERS—TIME IN WHICH TO FIX EXTENT OF APPROPRIATION.—When water is appropriated for some useful or beneficial purpose, the entire appropriation need not be at once utilized for the purpose designated, but the use may be made within a reasonable time, to be determined by the circumstances of each case.

WATERS—ABANDONMENT.—A prior appropriator, having the exclusive right to the use of part of, or all, the water of a stream, may lose the same by abandonment, express or implied. An abandonment by a failure to apply the appropriation to some useful purpose is as effective as an express abandonment.

WATERS—EFFECT OF ABANDONMENT.—When a water right is abandoned, the water becomes publici juris, and subsequent appropriators are entitled to it according to their respective priorities.

WATERS—ADVERSE POSSESSION—NONUSER.—A water right may be lost by the adverse possession of another; but nonuser by the owner and adverse user by another for a time equal to that fixed by the statute of limitations for the recovery of real property are necessary to divest title.

WATERS—CHANGING USE.—After water has been lawfully appropriated for some beneficial purpose, the place or character of its use may be changed, though such change injuriously affects one who uses the water after it passes from the control of the prior claimant. Hence, if water is appropriated for the purposes of placer mining and irrigation, and has been used for such purposes for a term of years, the place of its use may be changed at the pleasure of the owners.

WATERS—ABANDONMENT—EVIDENCE.—There can be no abandonment of a water right without an intent to abandon, and a relinquishment of the right; but the abandonment is complete when the intention to abandon and the relinquishment of possession unite. Time is not an essential element of abandonment; and the intent to abandon may be inferred from acts and declarations.

WATERS—EVIDENCE OF ABANDONMENT, WHEN INSUFFICIENT.—If water is appropriated for mining purposes, and the ditch conveying it is filled up at a certain point by permission of the appropriators with debris from a mine, but upon an agreement that the mine owners shall reopen the ditch upon request, there is no evidence of an intention to abandon the ditch below such point, though that part of it has not been used for fourteen years, where the water is actually employed during that time in that part of the ditch above the obstruction, and it appears that the appropriators have rejected several propositions to reopen the ditch and to furnish water to persons below the obstruction, because it would not pay them; and that they have frequently spoken of the unused part of the ditch as theirs, and have protected it from destruction, and refused to sell it.

WATERS—PRESCRIPTION.—In order to establish a right by prescription, the acts relied upon to create such prescriptive right must have been an invasion of the rights of the party against whom it is set up, of such a character as to afford him grounds of action. The use of water under a license, or by permission of the prior appropriator, is not hostile, and cannot support a claim of right by prescriptive or adverse user.

WATERS—PRESCRIPTION.—After water has been appropriated for mining purposes, and water from the ditch of the prior appropriator is discharged into the stream just above the head of the ditch of the subsequent appropriator, the fact that the subsequent appropriator used the water so escaping from the ditch of the prior appropriator for a period of fourteen years without interference by the prior appropriator does not create a right to use it by prescription or by adverse possession, as the use, under such circumstances, does not constitute any invasion of the rights of the prior appropriator, it being neither exclusive, adverse, hostile, nor under a claim of right.

WATERS—ESTOPPEL.—After water has been appropriated for mining purposes, and water from the prior appropriator's ditch is discharged into the stream just above the head of the subsequent appropriator's ditch, and the prior appropriator is using only a part of his ditch at the time the subsequent appropriator acquires his ditch with notice that his rights are subordinate to those of the prior appropriator, and that the prior appropriator has a right to operate his ditch to its full capacity, and it appears that the subsequent appropriator has never disputed such right, and has never claimed any specific amount of water, the prior appropriator is not estopped from taking enough water to fill his ditch by the fact that he has, for thirteen years, allowed considerable water to escape and go into the subsequent appropriator's ditch.

Suit to restrain the defendants from carrying the water of the east fork of the Illinois river beyond Scotch gulch and below the head of the plaintiffs' ditch. The plaintiffs George W. and W. J. Wimer, were the owners of a ditch used to divert the water of said stream, in Josephine county, at a point opposite, or immediately below, the mouth of Allen gulch. The plaintiffs' point of diversion was on the east side of said fork, and the water was conducted thence in a southerly direction to where it crossed the same stream by means of a flume constructed for that purpose, and thence in a southerly and southeasterly course to the plaintiffs' mine, located in what was known as Butcher's gulch. The water finally run into the west fork of the river. This ditch was constructed, in 1860, by Daniel Hunt, and was known as the

Hunt or Wimer ditch. Two of the defendants, George Simmons and Walter Simmons, became owners of the ditch on September 2, 1876, and conveyed it to Jacob, George W., and W. J. Wimer, by two conveyances, dated July 6, 1878, and February 7, 1883. On May 23, 1888, Jacob Wimer conveyed his interest to his two sons, the plaintiffs. On July 18, 1888, George W. and W. J. Wimer sold the property to Anna F. Smith, but, on November 31, 1892, they again became the owners thereof through a sheriff's deed upon a sale under foreclosure proceedings against Anna F. Smith and W. J. Wadleigh. The ditch of the defendants was constructed in 1856, and took its water from the west bank of the same stream as the Hunt ditch, but at a point some two and a half or three miles above. This ditch when first constructed was about seven miles in length. It carried a portion of the water diverted beyond Scotch, Allen, Shelly, and Butcher's gulches and into Fry, Waldo, and Caro gulches. The remainder of it was used at Scotch gulch, and through it was discharged into the said east fork above the head of plaintiffs' ditch. This ditch was known as the Scotch gulch or Desselles and Connell ditch. In 1877, William Bybee, while working some mining ground at the head of Allen gulch, allowed the tailings and debris from his mine to be carried down to and across this ditch, filling it up and obliterating it for the space of two or three hundred feet. After this, the ditch below the obstruction fell into disuse until 1891, when the defendants purchased it from Desselles and Connell, together with their mining grounds at Scotch gulch. The defendants restored the ditch to about its original capacity. This ditch had been purchased, in 1866, by Desselles and Connell, together with a placer mine of about twenty acres, located in Scotch gulch, and they had worked the mine every year from 1866 to 1891, with the possible exception of a year or two immediately before 1891. The proof was not clear as to this. George Simmons, one of the defendants, had operated the mine for about nine months during 1887 and 1888, under a contract to purchase from Desselles and Connell. It was practically worked out at the time of the purchase by the defendants. At the time that the evidence was taken in this case, some work was being done on the mine, but it was not of much consequence. Some Chinamen had mined in Allen gulch, in 1888, and had purchased and utilized from the Desselles and Connell ditch between fifty and seventy-five inches of water. The lack of water, in the stream, to supply both ditches during the latter part of spring, during the summer and early fall, and at times during the win-

ter months, was the cause of this suit. There was a decree for the defendants, and the plaintiffs appealed.

George W. Colvig, Robert G. Smith, and Bronaugh, McArthur, Fenton & Bronaugh, for the appellants.

Carey, Idleman, Mays & Webster, C. W. Kahler, and Hammond & Vawter, for the respondents.

¶ WOLVERTON, J. The plaintiffs contend that they are entitled to the quantity of water that has been carried through their flume, at the crossing of the east fork of the Illinois river, during the period intervening from 1877 to 1891. They base their claim of right upon the following propositions: 1. The owners of the defendants', or Scotch gulch, ditch abandoned all that part of it below Scotch gulch in 1877; 2. The owners of said ditch abandoned all the water thereof that was turned or ⁶ allowed to flow back into said stream through Scotch gulch in 1877; and 3. Plaintiffs have acquired a prior and perfect right to the waters of said stream, as against defendants, by adverse possession and use during the time intervening from 1877 to 1891.

1. It is the policy of the law that water of a stream shall be appropriated to the extent only that it is put to, or designed for, some useful or beneficial purpose. This is the measure of the appropriation. The entire appropriation may not be utilized at once for the purpose designed. In such case, a reasonable time is allowable within which to make the application to such purposes, and the surroundings and circumstances of each particular case are elements for consideration in determining what is a reasonable time within which to complete and fix the extent of the appropriation: *Hindman v. Rizor*, 21 Or. 112; *Simmons v. Winters*, 21 Or. 35; 28 Am. St. Rep. 727; *Low v. Rizor*, 25 Or. 556; *Cole v. Logan*, 24 Or. 304; *Sieber v. Frink*, 7 Col. 154.

2. A prior appropriator, having the exclusive right to the use of part of or all the water of a stream, may lose the same by abandonment. When abandoned, the water becomes *publici juris*, and subsequent appropriators are entitled to it according to their respective priorities. The abandonment may be express and immediate, as by the intentional act of the owner and possessor of the right, or it may be implied from his neglect, failure of application to the purpose designed within a reasonable time, nonuser, and the like: *Kinney on Irrigation*, sec. 253; *Black's Pomeroy on Water Rights*, sec. 96.

3. The right of a prior appropriator may also be lost by the adverse possession of another. Nonuser by the ⁷ owner of

the right, and adverse user of it by another, for a time equal to the period fixed as the limitation of actions for the recovery of real property, is necessary, in this state, to work a forfeiture through this method: Black's Pomeroy on Water Rights, sec. 98; Dodge v. Marden, 7 Or. 458; Union Water Co. v. Crary, 35 Cal. 508; 85 Am. Dec. 145. These general propositions of law are well established, and it is unnecessary to support them further by citation of authorities. Keeping them in mind, let us consider the relative rights of the parties in the light of the facts as disclosed by the testimony.

For some years prior to 1877, the Desselles and Connell ditch carried from six hundred or seven hundred to a thousand inches of water to Scotch gulch. Beyond that Desselles says "it would carry about four hundred inches." In answer to the question, "How many inches flowed down the ditch beyond Scotch gulch, he replies: "Three hundred and fifty inches, used by Joseph Smith in Scotch gulch, Spellman and brother in Allen gulch, some Chinamen in Sailor gulch, and Shelly and Company below the town of Waldo for mining and irrigating purposes." George Simmons, one of the defendants, in answer to the question, "How does the size of the ditch since you cleaned it out compare with the size of it as it was when the Wimer ditch was dug?" answered: "Oh, it is about the same size." W. J. Wimer, one of the plaintiffs, testifying in August, 1893, says that defendants, at that time, were carrying in their ditch beyond Scotch gulch three hundred or four hundred inches. He thought three hundred inches at any rate, while plaintiffs were at the same time carrying from one hundred and fifty to two hundred inches. Considering that defendants' ditch intercepts the stream above that of plaintiffs', it is probable that water was flowing therein beyond Scotch gulch to ^s the extent of its average capacity. The mines at Scotch gulch, which the defendants purchased with the ditch from Desselles and Connell, are practically worked out, so that they are unfit for profitable mining. George Simmons says, in effect, that Scotch gulch is mined out—the most of it; that there are no mines there to amount to anything; that there is one man there now working with a pick and shovel. This was the probable condition of these mines at the date of defendants' purchase in 1891, as it does not appear that they have ever been worked by them since they became the owners thereof. We deduce from this the defendants' intentions at the time of the purchase. It was not to work the mine at Scotch gulch, but to carry the water beyond, to the extent of the capacity of the old ditch,

for use at such points as might be convenient. The evidence on this point is quite meager, and we can only judge of the intended use by that which they are now making of it. George Simmons says they are using a little for mining purposes at their mine, probably fifty inches, and some for irrigating grass and cultivated crops; that they "turned some of it down the river to the ranch, that Wimers ought to have turned the water out to irrigate," and "run a little water down to Decker." He also says they have valuable mining property that it will take a number of years to work out; so that the use which defendants are making of the water is not dissimilar to that which Desselles and Connell made of it prior to 1877 beyond Scotch gulch, except that defendants appear to be employing the same for mining and irrigation on their own account, while Desselles and Connell sold to third parties for like uses and purposes. No question is made but that a valid appropriation, prior to that of plaintiffs, was made by the predecessors of defendants of the water of the said east ⁹ fork for use at Scotch gulch for mining purposes, and that the relative position and rights of the parties continued unchanged to the year 1877. The contention that defendants' predecessors abandoned their ditch below Scotch gulch in that year, by allowing it to become obstructed, and to fall into disuse at that time, presupposes this state of facts, as there can be no abandonment unless such right or privilege existed in some person or persons who could waive its benefits.

4. A valid appropriation having once been made of the water of a stream, it becomes a pertinent inquiry whether it is permissible to change the place of its use. Undoubtedly, there could be no objection to such change, where it does not injuriously affect third parties. The predecessors of defendants, prior to 1877, used a portion of the water appropriated by them beyond Scotch gulch. From 1877 to 1891 this water was used at Scotch gulch, and allowed to flow into the river again at a point above the head of plaintiffs' ditch, so that they secured the use of the surplus after use by defendants' predecessors for mining purposes. In 1891 the defendants, having succeeded to the rights of their predecessors in their appropriation of water, again changed the place of its use, and carried a portion of it beyond the head of plaintiffs' ditch, where it was entirely lost to them. By this plaintiffs claim they are injuriously affected, and that defendants are without lawful authority for so doing. The question as to whether or not plaintiffs are, in legal contemplation, so injuriously affected, is involved in the consideration of the right of defendants to

change the place of use. If they had such right, then no injury can result ¹⁰ to the plaintiffs by reason of the change of which they can justly complain. Burnett, J., in *Maeris v. Bicknell*, 7 Cal. 263, 68 Am. Dec. 257, says: "The next question that arises in this case is, whether a party who makes a prior appropriation of water can change the place of its use without losing that priority, as against those whose rights have attached before the change. This question, we think, can admit of but one answer. It would seem clear that a mere change in the use of the water from one mining locality to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the prior right of the party. It would destroy the utility of such works were any other rule adopted." In *Davis v. Gale*, 32 Cal. 33, 91 Am. Dec. 554, the court say: "Suppose a party taps a stream of water for the purpose of surface mining in a given locality, and afterward finds that the ground will not pay, or that ground farther on will pay better, may he not abandon the former and extend his ditch to the latter without losing his priority? Or, suppose, after working off the surface, he finds quartz, may he not erect a mill and convert the water into a motive power without forfeiting his prior right? We think all this may be done, and are unable to suggest a plausible reason why it may not. In cases like the present, a party acquires a right to a given quantity of water by appropriation and use, and he loses that right by nonuse and abandonment. Appropriation, use, and nonuse are the tests of his right; and place of use and character of use are not. When he had made his appropriation, he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water rights and ¹¹ privileges": See, also, *Woolman v. Garringer*, 1 Mont. 535; *Kinney on Irrigation*, sec. 233.

The nature of the use for which water is appropriated operates as notice to subsequent appropriators whether the place of use may or may not be changed. If the purposes for which it is to be applied have the effect of eliminating it from existence, absorbing it, using it up absolutely, then it can make no kind of difference to subsequent appropriators in what locality it may be utilized. Of such nature is the appropriation of water for irrigation purposes. Beatty, J., in *Last Chance Min. Co. v. Bunker Hill Min. Co.*, 49 Fed. Rep. 432, says: "The appropriation of

water for placer mining purposes at some specified place involves a somewhat similar principle. It is such an actual appropriation of a definite amount, and for such purposes, as, in the nature of things, must operate as a notice to all that its place of use must, from time to time, as the ground is worked, be changed. Should one use the water after it passes from the works of the prior claimant, he must do so at his own risk, and he cannot complain that changes are made which he had full notice would likely occur": See, also, *Lowden v. Frey*, 67 Cal. 474; *Ballard v. Stone*, 67 Cal. 477; *Ramelli v. Irish*, 96 Cal. 214. A case very much in point is that of *Meagher v. Hardenbrook*, 11 Mont. 385. The survey of the "Miner's Ditch" was commenced in the latter part of the year 1869. It was built and owned jointly by twenty-four persons, each being represented by a share. At the time of the commencement of the action, the defendants Hardenbrook and Kelly were the owners of eight and three shares, respectively. The owners of the ditch were, at the same time, owners of certain placer mines in three different gulches. In the summer of 1871 the water ¹² was turned in as far as Prairie and Spring gulches, and a year later into Antelope gulch. "Miner's Ditch" was abandoned in 1886, since which time none of its waters had been used for placer mining, but were turned into Racetrack creek, and recaptured by Hardenbrook, and used for the purpose of irrigating land belonging to him to the extent of four hundred inches. It was held by the court that all the waters of "Miner's ditch" were abandoned in 1886, except the four hundred inches used by Hardenbrook, and to that extent they were not. It was taken for granted by both the counsel and the court that the place of use could be changed, and the court went farther, and held that the mode and manner of use could also be changed. The doctrine that a prior appropriator for the purposes of irrigation may change the place of its use it recognized by this court in *Cole v. Logan*, 24 Or. 304, 313. We take it, then, that where the appropriation is made for the purposes of placer mining and irrigation, and the water thus appropriated has been actually used for those purposes for a term of years, as in this case, the place of its use may be changed at the pleasure of the owners and possessors of the right, and that plaintiffs cannot be heard to complain on that account. The defendants, therefore, had the right to change the place of the use, in 1891 from Scotch gulch to such point or points beyond as they could make the water available for mining and irrigation purposes, unless, as is claimed by plaintiffs, the

right to flow water past Scotch gulch was abandoned by defendants' predecessors in 1877.

5. An abandonment of a right is a forsaking or desertion of it, and operates as a relinquishment thereof. There can be no abandonment without some action of the will and an intent to abandon, but such intent may be inferred ¹³ from the acts and declarations of the party against whom the relinquishment is claimed. Time is not, however, an essential element of abandonment. The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete: *Mallett v. Uncle Sam Min. Co.*, 1 Nev. 204; 90 Am. Dec. 484; *Dodge v. Marden*, 7 Or. 460.

6. As we have seen, Desselles and Connell carried through their ditch beyond Scotch gulch, prior to 1877, some three hundred and fifty or four hundred inches of water, which to the extent of three hundred and fifty inches, was actually used for mining and irrigation purposes. By this use, it is admitted by plaintiffs that Desselles and Connell acquired a perfect and subsisting right, prior and superior to any right of theirs, to the use of the water of said stream. But it is claimed that Desselles and Connell abandoned their right to flow water beyond Scotch gulch in 1877, and that plaintiffs' subsequent appropriation thereof gives them a right superior to defendants, and that, on this account, no right exists in the defendants at this time to the use of any part of the water of said stream at any point below Scotch gulch, whereby its use would be lost to plaintiffs. The evidence is clear that the ditch was filled up in 1877 for the space of two or three hundred feet at Allen gulch by the tailings and debris from William Bybee's mine. Desselles and Connell gave permission for this to be done, but with the express understanding that Bybee should open it again when called upon to do so. True, they never called upon Bybee to clean it out, but there is no intention manifest on their part to abandon this ditch at that time. The transaction would indicate an intention quite to the contrary. If not abandoned at that time, was it abandoned later? James W. ¹⁴ Wimer, a brother of plaintiffs, testifies: "My father made them (Desselles and Connell) a proposition to repair the ditch, and to furnish water, and they refused to do so." W. J. Wimer, one of the plaintiffs, testifying to the same conversation, says: "Father wanted to have water to irrigate his orchard at Waldo, and he bought the orchard of Mr. Simmons—quite a fine orchard—and he wanted to irrigate it. People said it would n't live unless he did, and the town was dry, and he proposed to try

to get the water from Scotch gulch, from defendants' ditch, being the only chance to get it, so he approached them about rebuilding the ditch, and we talked it over in the store a number of times, both Mr. Desselles and Mr. Connell and father and myself. I think, though, father done nearly all the talking. And they asked us, in reply to our question whether they would bring the water in there or not—they asked us one hundred dollars per year. They said they would do it for one hundred dollars a year, if we would rebuild the ditch; they said they would sell us the water for one hundred dollars a year. . . . But they stated there in my presence—and I talked with them myself—they stated there was nothing in it to rebuild the ditch, and I remarked that it was pretty steep for a man to rebuild the ditch, and to have to give one hundred dollars for the water, and they said it was worth one hundred dollars for the water and there was nothing in it for them to rebuild the ditch. That is what they said, and they was n't going to rebuild the ditch." This was in 1877, but after the Scotch gulch ditch was filled up, and before witness first became interested in plaintiffs' said ditch and mine. The witness, continuing, says: "In answering that question I don't wish to be understood, in order to make my evidence look big—I don't say that they said the ditch would not be extended—I don't mean to say they said they never ¹⁵ would do it. I mean to say that they repudiated or rejected our proposition." T. A. Jackson's testimony is to the same purport, but he thinks the conversation occurred in 1880.

James Spence testifies: "I endeavored at one time to buy water—spoke to Mr. Connell. I had a mining claim on what is called Sailor gulch. I spoke to Mr. Connell; told him I had a claim on Sailor gulch, and I would like to buy water of him, if he would sell me any. He remarked that it would take more money to fix up the ditch than there was in my ground, and his remarks were to the effect that he would n't do it." This was in 1878 or 1879. The witness wanted about fifty inches of water to work a small piece of ground. Sailor gulch is about two and a half miles, by the ditch, below Scotch gulch. Daniel Hunt testifies: "I don't remember whether they said anything particularly about it or not, but I have heard Connell speak frequently about their water; they always thought their water would work Fry gulch, and was the only water that would. The other ditch is a good deal lower, and would n't have the pressure, and he has always talked more or less about it. I never paid particular attention to it." In answer to question 1022, "Did you have any talk with

Desselles and Connell upon the subject of taking the water around Fry gulch?" George Simmons says: "I have heard them speak about taking the water around there"; and to question 1023, "What did they say about it?" he answers, "They were talking about Fry gulch being mining ground, and they said they thought that, when they got through with Scotch gulch, they would take it down there." William Darkis testifies: "I heard Jim Connell say that, when they worked out their claim, the ditches could be run to town [Waldo], and they could ¹⁶ sell them there—work the Johnsons' ranch." T. Cameron, one of the defendants, testifies: "He [Desselles] said—it was in the spring of 1891—I asked him if he had ever abandoned any part of that ditch, or any branch of it, or any part of it, and he said he had not"; and to interrogatory 9, "State whether or not you abandoned any part of said ditch below Scotch gulch?" J. B. Desselles answered, "We did not." Interrogatory 10: "Did you, or did you not, exercise acts of ownership over said ditch through its entire length until you sold it to Simmons and Company in 1891? A. We did, with the exception of nine months." Cross-interrogatory 17: "What act of ownership did you exercise over said ditch beyond Scotch gulch after you acquired it? A. We claimed it was our own; we protected the ditch, and tried to keep the people from destroying it, and we refused at one time to sell that part of the ditch from Scotch gulch to Waldo." This latter answer is corroborated by another witness, who says that Desselles refused to sell the lower part of the ditch unless he could sell the whole. The nine months mentioned in Desselles' testimony, in which he and Connell failed to exercise ownership in the ditch, refers to the period during which George Simmons was in possession, under contract for purchase.

From all this we are to gather the intention of Desselles and Connell with reference to an abandonment by them in 1887 of their right to carry water beyond Scotch gulch. The part of their ditch used for this purpose undoubtedly fell into disuse at that time, and was allowed by them to continue so until 1891, when they sold to defendants. The water, however, diverted from the said east fork by means of their ditch, was used by them during ¹⁷ nearly all of this time for mining purposes at Scotch gulch; so that, while a portion of the ditch fell into disuse, the water was actually employed for a beneficial and useful purpose. Whatever might have been the presumption arising by reason of the nonuse of the water for this great length of

time, it cannot prevail here, because the water itself was utilized; and, as we have seen, Desselles and Connell had a perfect right to change the place of its use. Thus it is demonstrated, without further reasoning, that the right to the use of the water was not abandoned by them. Aside from this consideration, the fact that Desselles and Connell arranged with Bybee for opening their ditch again before they allowed it to be closed; that they, from time to time, entertained and considered propositions from different persons for opening out this ditch, and the employment of the same for conveying water to different points below Scotch gulch; that they refused to sell this part of the ditch without the whole; and that they contemplated using the water through this ditch at Fry's gulch, when their mines were worked out at Scotch gulch, all tend to show that there was an entire absence, during all these years, of any intention on the part of Desselles and Connell to abandon their right to the use, below Scotch gulch, of the water diverted by means of their ditch. Hence, there was no abandonment by Desselles and Connell of the ditch below Scotch gulch, or of the water thereof, in 1877. The claim of plaintiffs is, in effect, that Desselles and Connell abandoned a more general appropriation for a particular one, that of placer mining at Scotch gulch, and that since such was the case, they were powerless to again resume their original appropriation, to the injury of plaintiffs. The logical result of the contention, if successful, would be to deprive Desselles and Connell ¹⁸ entirely of their appropriation as soon as their mines at that point were exhausted, and it has been shown that the mines were practically worked out at the time they sold to defendants. From a very careful review of the whole testimony, we have not found that Desselles and Connell at any time designed or intended to place any different limitation upon their appropriation than that which existed at the time they became the owners and possessors of the right; hence, there was no abandonment upon their part. Much stress was laid upon the case of *Schulz v. Sweeny*, 19 Nev. 359, 3 Am. St. Rep. 888, and cases of like nature, as authority in point showing an abandonment. In the case referred to, the very act of discharging the water again into a natural channel, by reason of the nature of the use, and the absence of an intention to reclaim, constituted an abandonment. Such is not the case here.

7. We will now consider whether plaintiffs have acquired a prior and superior right to the water of the east fork of the Illinois river, as against defendants, by adverse possession and use

during the time intervening from 1877 to 1891. In order to establish a right by prescription acquired by adverse use, the acts relied upon to constitute such prescriptive right must have been an invasion of the rights of the party against whom it is set up of such a character as to afford him grounds of action: *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 192; *Union etc. Min. Co. v. Ferris*, 2 Saw. 187. To bar the right of the defendants, the use of the water by plaintiffs must have been under a claim of right, open, notorious, exclusive, adverse, and hostile to that of defendants and those under whom they derive title: *Faull v. Cooke*, 19 Or. 467; 20 Am. St. Rep. 836; *Thomas v. England*, 71 Cal. 19 458; *Alta Land etc. Co. v. Hancock*, 85 Cal. 226; 20 Am. St. Rep. 217; *Kinney on Irrigation*, sec. 294. The use of water under a license, or by permission of the prior appropriator, is not hostile, and cannot support a claim of right by prescription or adverse user: *Huston v. Bybee*, 17 Or. 147; *Feliz v. Los Angeles*, 58 Cal. 73. That plaintiffs have had the use of the water diverted by means of defendants' ditch during the time alleged, after use thereof by defendants at Scotch gulch, there is no question. But such use was not adverse to the right of defendants; neither their rights nor those of their predecessors were invaded thereby. At no time could Desselles and Connell have maintained an action against the plaintiffs by reason of their appropriation of the water that was allowed to escape, after use, down the main channel of the said east fork above the head of plaintiffs' ditch. The use by plaintiffs was, during all this time, simply by the permission and indulgence, or rather at the sufferance, of Desselles and Connell. These conditions could neither create nor support a right or title by prescription or adverse possession. As was said in *Woolman v. Garringer*, 1 Mont. 535: "The plaintiffs could acquire no other than a mere privilege or right to the use of the waste water, or, at most, but a secondary and subordinate right to that of the first appropriators, and only such as was liable to be determined by their action at any time": See, also, *Ball v. Kehl*, 95 Cal. 606.

8. Now as to the estoppel invoked in behalf of plaintiffs and against defendants. It is contended that "one who stands passively by and allows another to open out fields and irrigate them with water, or another to open up mines and use water to work them, for thirteen years, under the belief that he has a vested right to the use thereof, is estopped from subsequently denying this right." 20 Such a condition of things would, perhaps, be sufficient to create an estoppel in pais, if it be implied that the

defendants, or their predecessors in interest, in good conscience ought to have spoken in the assertion of their rights, and that, by reason of their passiveness or nonaction, plaintiffs have been misled to their injury. "Nobody ought to be estopped from averring the truth or asserting a just demand, unless, by his acts, or words, or neglect, his now averring the truth or asserting the demand would work some wrong to some other person, who has been induced to do something, or to abstain from doing something, by reason of what he had said or done, or omitted to say or do": 1 Hermann on Estoppel, sec. 7, subd. 5. The question, then, is one of fact, to be determined upon the evidence, whether: 1. The defendants, or their predecessors, were in duty bound to make any other assertion of their rights than their acts, during the time mentioned, would indicate; and 2. Whether the plaintiffs have been misled to their injury. Defendants contend that there has been an enlargement of plaintiffs' ditch since the Wimers first acquired an interest in it subsequent to the year 1877. Plaintiffs assert the contrary. But assuming, without deciding, that their ditch was, at the commencement of this suit, of the same capacity as when first constructed in 1860, the most natural deduction to be made is, that the capacity of this ditch is the measure of the first appropriation made by means thereof when constructed. At that time, a prior appropriation had been made by means of the Scotch gulch ditch, and, presumably, water was being carried to points below Scotch gulch, so that it did not again intercept the stream above plaintiffs' ditch. The appropriation, therefore, through plaintiffs' ditch at this early date was in subordination to the rights of defendants' predecessors. This state of facts existed ²¹ in 1877. Since that time plaintiffs assert they have used the same ditch without an enlargement of its capacity down to the present time. Like conditions were prevalent in this respect since 1877 as existed prior thereto. There was nothing, then, in these conditions by which defendants were even impliedly notified that plaintiffs were increasing, or had at any time increased, their appropriation; and no direct notice was ever given defendants, or their predecessors, of any claim of an increased appropriation, or that defendants' rights were regarded as having been subordinate to the rights of plaintiffs, until shortly prior to the defendants' purchase from Desselles and Connell in 1891. The simple fact that plaintiffs were using the water during this time, after use by defendants and their predecessors, and, as we have seen, by their sufferance, was not an infraction of the latter's rights. Hence

we see nothing in the surroundings making it incumbent upon the defendants, or their predecessors, to make protest against the acts of plaintiffs.

Were plaintiffs misled to their injury? W. J. Wimer was asked, "Did you ever have any conversation with Mr. Simmons about the size of this [plaintiffs'] ditch at the time you bought it?" to which he replied, "My father did in my presence. My father asked Mr. Simmons, when we were talking about buying in the property, about the ditch, and he said that our headbox was a six-foot box—six feet wide and five feet high—and that we were entitled to build our entire ditch that size." Again, "Did he say anything about his rights against the Scotch gulch ditch?" "A. We asked him that question, if there was any prior adverse rights, and he said the Scotch gulch ditch was a first right over his ditch; that they were running the water in the river above the ²² headgate, and he didn't think they would ever take it out." In 1882 witness, by a report made of the Scotch gulch ditch and mine to the director of the United States mint for publication in the United States Gold and Silver Mining Report, in effect recognized the rights of Desselles and Connell to the full extent, as claimed by them, to carry water below Scotch gulch. In the winter of 1888 and 1889, some Chinamen used water from the Scotch gulch ditch in Allen gulch. At this time, Mrs. Anna F. Smith was the owner of the plaintiffs' ditch, but was operating it through W. I. Wadleigh, who was her recognized agent. Wadleigh testified concerning this incident—and incidentally of the rights of Desselles and Connell at that time—as follows: "Q. By whom was it used? A. By some Chinamen. Bought water of the Scotch gulch company. Q. Well, was it used there at any time when you were there—the water? A. Yes, sir. Q. Well, why didn't you go and get it? A. Why, they had a right to sell the water; I could n't have stopped them. Q. Was it your understanding their right was superior to yours? A. Yes, sir. Q. Did you recognize the right of the Scotch gulch company to carry their water around you? A. I did." This evidence, taken in connection with the fact that the Wimers have been acquainted with the Scotch gulch ditch, and the management thereof by its owners, since 1877, as well as their own, is a refutation of the idea that plaintiffs have been misled; and, if not misled, no injury could follow. We therefore conclude from the testimony, which we have carefully and critically examined, that there is no ground for invoking the doctrine of equitable estoppel as against defendants. We are satisfied ²³ that at the

time of the commencement of this suit, and prior thereto, defendants were carrying no greater amount of water below Scotch gulch by means of their reconstructed ditch than they were entitled to carry under their appropriation, as its conditions prevailed at that time, and hence the injunction was correctly dissolved and the complaint dismissed.

Affirmed

WATERS — PRIOR APPROPRIATION — ABANDONMENT. — To constitute a valid appropriation of water, it must be made for some beneficial purpose then existing or contemplated: *Simmons v. Winters*, 21 Or. 35; 28 Am. St. Rep. 727; and must, within a reasonable time, be applied to such use: *Wheeler v. Northern Colorado Irr. Co.*, 10 Col. 582; 3 Am. St. Rep. 603. Diversion of water, without applying it to a beneficial use within a reasonable time, is not an appropriation thereof, and is unlawful: *Combs v. Agricultural Ditch Co.*, 17 Col. 146; 31 Am. St. Rep. 275. Priority of appropriation of water in point of time gives superiority of right among appropriators for like beneficial purposes: *Strickler v. Colorado Springs*, 16 Col. 61; 25 Am. St. Rep. 245, and note; *Hammond v. Rose*, 11 Col. 524; 7 Am. St. Rep. 258, and note; *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534; 97 Am. Dec. 550. Water may be appropriated for mining or irrigation, as these are beneficial purposes: *Isaacs v. Barber*, 10 Wash. 124; 45 Am. St. Rep. 772; see monographic note to *Heath v. Williams*, 43 Am. Dec. 279, on rights acquired by prior appropriation of water of stream on public lands. A water right may be abandoned or lost: *Union Water Co. v. Crary*, 25 Cal. 504; 85 Am. Dec. 145. Such abandonment is a matter of intention, and, to constitute abandonment, there must be an intent to abandon: *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558; *Hindman v. Rizer*, 21 Or. 112, 119. If a prior appropriator of water abandons his appropriation, without an intent to recapture the water, he loses his priority against parties subsequently appropriating it. Ceasing to use a mining ditch for a long time after the appropriator's mine is worked out is evidence of an abandonment; but, under the United States statute of 1866, it is held in Oregon that nonuser works no abandonment, unless continued long enough to give a title to realty under the statute of limitations: Note to *Heath v. Williams*, 43 Am. Dec. 282. Water rights may be extinguished by the appropriation and adverse use thereof by some other person, if continued long enough to create a right in the adverse holder under the statute of limitations: *Alta Land etc. Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217, and note; *Union Water Co. v. Crary*, 25 Cal. 504; 85 Am. Dec. 145. To constitute such an adverse possession of a water right as will bar the title of the legal owner by lapse of time, it must have been an invasion of his right, such as to give him a ground of action against the intruder. It must be accompanied by all the elements necessary to make out an adverse possession: *Alta Land etc. Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217; and this, of course, requires that the possession be visible, continuous, notorious, distinct, and hostile, and of such a character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant: See monographic note to *De Frieze v. Quint*, 28 Am. St. Rep. 158, on adverse possession. Nonuser does not impair any of the owner's rights in the water of a stream, nor confer any adverse rights upon another: Note to *Heath v. Williams*, 43 Am. Dec. 274. A prior appropriator of water may change the point of diversion at pleasure, if he does not thereby injure the rights of others: *Strickler v. Colorado Springs*, 16 Col. 61; 25 Am. St. Rep. 245, and note; and he may change the place of using the water, as well as the mode and objects of its use: *Whittier v. Cocheco Mfg. Co.*, 9 N. H. 454; 32 Am. Dec. 382, and note.

The test of one's right in a mineral region is its appropriation and use, and not the place and character of its use: *Davis v. Gale*, 82 Cal. 26; 91 Am. Dec. 554, and note. A mere change in the use of water from one mining location to another does not forfeit the appropriator's prior right: *Maeris v. Bicknell*, 7 Cal. 261; 68 Am. Dec. 257, and note.

BRADTFELDT v. COOKE.

[27 OREGON, 194.]

CONTRACTS—ENFORCEMENT OF WHEN ILLEGAL.—A court will not, in an action between the parties to an illegal contract, lend its aid, either to annul it when executed, or to enforce it when executory.

FRAUDULENT CONVEYANCES—VALIDITY OF AS BETWEEN THE PARTIES.—A conveyance made to hinder, delay, or defraud the grantor's creditors is valid between the parties thereto when there is a consideration to support it.

FRAUDULENT CONVEYANCES—VALIDITY OF, AS TO CREDITORS.—There is a marked distinction between contracts which are void ab initio, and those which are void only as to third persons. A fraudulent conveyance is not void, but merely voidable at the suit of the creditor, and is, therefore, capable of ratification.

FRAUDULENT CONVEYANCES—ENFORCEMENT OF, BETWEEN THE PARTIES—CONSIDERATION.—If the owner of one piece of land, for the purpose of defrauding his creditors, conveys another piece, in which he has no interest, and takes from his grantee, at the same time and as part of the same transaction, a note, and a mortgage on the first piece of property to secure its payment, there is a consideration for the note and mortgage, and the contract is enforceable between the parties thereto.

VENDOR AND PURCHASER—RESCISSIION OF SALE.—A grantee of land conveyed with warranty has a remedy upon the covenants of his deed for a failure of title, and, if a perfect title is tendered by the grantor before a decree is rendered, the contract will not be rescinded unless it appears to the court that the grantee has sustained some loss, injury, or damage, by reason of the delay in perfecting the title.

CONTRACTS.—IF TWO CONTRACTS ARE CONTEMPORANEOUSLY EXECUTED by the same parties, and relate to the same subject matter, they must be construed together as constituting but one agreement.

MORTGAGES—DELIVERY.—The delivery of an instrument is a question of fact, but this may be inferred from circumstances. The fact that a mortgage has been returned to the mortgagor, for safekeeping, after it has been delivered to the mortgagee, does not defeat its delivery.

NEGOTIABLE INSTRUMENTS—REASONABLE ATTORNEY FEE.—If a note provides for a reasonable attorney fee, in case of suit, and there is an issue as to what is such a fee, the statutory attorney fee only will be allowed, unless some evidence is taken as to what constitutes a reasonable attorney fee.

Suit by Eliza Bradtfeldt to foreclose a mortgage alleged to have been executed by the defendant, Martha S. Cooke, to secure the payment of a promissory note for four thousand dollars. The complaint was in the usual form. It was shown by the

evidence that on November 7, 1891, the plaintiff being the owner in fee simple of lot 5, block 21, in Albina addition to Portland, Oregon, for the expressed consideration of four thousand dollars, executed to the defendant a deed containing a covenant of warranty against all encumbrances, except three mortgages given to secure the payment of demands aggregating two thousand three hundred dollars, which purported to convey lot 5, in block 51, in said addition. At the same time, the defendant executed to Eliza Bradtfeldt a note for four thousand dollars, payable in one year, with interest, and a mortgage upon lot 5, in block 21, in said addition, which purported to secure the payment of the note. Mrs. Cooke, however, retained possession of the mortgage until August, 12, 1892, when it was procured from her by a ruse, and recorded. Henry Witt, who held one of the mortgages excepted in Eliza Bradtfeldt's covenant of warranty was, on January 18, 1892, paid the sum of one thousand and fifty dollars by Mrs. Cooke, and his mortgage was canceled of record. The execution of the note was admitted by the defendant, but she denied that there was any consideration received for it. She also admitted signing and acknowledging the mortgage, but denied that it was made to secure the payment of the note. The defendant, for a further defense, alleged that Eliza Bradtfeldt represented to her that she was having trouble with her divorced husband, F. H. Shroeder, who was threatening to sue her for wages that he claimed to be due him, and requested the defendant to take a deed to said property, so that, if Shroeder obtained a judgment against her, he could not sell the property upon execution; and that for this purpose and without any consideration therefor, the plaintiff executed said deed. Mrs. Cooke further alleged that it was agreed that the defendant should retain possession of the mortgage, but that the plaintiff, by falsely representing that she wished to show it to her relatives, unlawfully obtained possession of it, and had it recorded. She further alleged that it was at plaintiff's request that she paid Henry Witt the sum of one thousand and fifty dollars, and had his mortgage satisfied of record. Mrs. Cooke tendered to the plaintiff a deed to said lot 5, in block 51, and prayed that she might be subrogated to Henry Witt's rights and interest in his mortgage, that the lien of Witt's mortgage might be restored and foreclosed, and that her note and mortgage to Eliza Bradtfeldt might be canceled. The new matter in the answer was demurred to, but the demurrer was overruled, and the plaintiff replied to it. The cause was referred to

a referee, and evidence was taken, from which the court found the additional facts that plaintiff claimed that she sold and conveyed to Mrs. Cooke lot 5, in block 21, and that the mortgage was executed back to secure a part of the purchase price, but that the proof did not show that the plaintiff ever conveyed lot 5, in block 21, to Mrs. Cooke, or that she ever obtained title to that lot; that there was no consideration for the note and mortgage executed by Mrs. Cooke; that, at the time of the execution of the deed, the plaintiff did not intend to sell, or Mrs. Cooke intend to purchase, the lot described in the mortgage, or the lot described in the deed; that there was no understanding or agreement between the parties that there should be a sale and purchase of either of the lots; that, on the contrary, it was understood and agreed between them that Mrs. Cooke should take a conveyance of lot 5, in block 21, and hold the title for the use and benefit of the plaintiff; that the plaintiff, up to the commencement of this suit, had continued in possession of the lot last named, and exercised acts of ownership respecting it; that the acts and things done by Mrs. Cooke concerning the property were at plaintiff's special instance and request; that the said defendant did not see the said lot at the time of said conveyance, or for many months afterward; that nothing appeared to show that Mrs. Cooke made any inquiry concerning the value of the lot, or that she had the title examined, or used or exercised any of the precautions usually exercised by purchasers; that the note was delivered to Eliza Bradtfeldt on November 7, 1891, but that Mrs. Cooke never delivered the mortgage to her; that the plaintiff, by false statements and representations made many months after the execution of the instruments, wrongfully obtained possession of the mortgage, without consideration, and had it recorded; that at the time Mrs. Cooke paid the Witt note and mortgage, she believed that the title to the property encumbered by that mortgage was vested in her; that it appeared from the evidence that the lot owned by Eliza Bradtfeldt was lot number 5, in block 21, in the original townsite of Albina; and that the description in the deed made by plaintiff to the defendant was erroneous. It was decreed that the note and mortgage executed by Mrs. Cooke be surrendered and the mortgage canceled; that Mrs. Cooke recover one thousand and fifty dollars paid upon the Witt mortgage, with interest, and stand in the relation of assignee of that mortgage, and hold a lien upon lot 5, in block 21, in said addition, to secure the payment of the principal and interest; that said lien be foreclosed, and the expense of the sale, and the debt, be paid from

the proceeds of the sale of the lot; and that Mrs. Cooke recover her costs and disbursements of the suit. The plaintiff appealed from this decree.

Watson, Beekman & Watson and George W. P. Joseph, for the appellant.

Edward N. Deady and William M. Davis, for the respondent.

¹⁹⁸ MOORE, J. The plaintiff contends that the new matter alleged in the answer does not constitute a defense to the suit, and that the court erred in overruling the demurrer thereto; while the defendant insists that she may plead her participation in the scheme to hinder, delay, or defraud the plaintiff's creditors, and that, the note and mortgage being evidence of an executory contract, which, as she contends, is illegal, the court should not enforce it. The defendant's contention proceeds upon the theory that, she being in *pari delicto*, the maxim, *Potior est conditio defendentis*, applies to prevent a recovery in cases where the contract sought ¹⁹⁹ to be enforced has not been executed. The rule is well settled that a court will not, in an action between the parties to an illegal contract, lend its aid, either to annul it when executed, or enforce it when executory: *Willis v. Hoover*, 9 Or. 418; *Bernard v. Taylor*, 23 Or. 416; 37 Am. St. Rep. 693. But while the decisions are quite uniform in affirming the foregoing rule, there is an irreconcilable conflict of judicial opinion in defining an illegal contract, and hence the important question to be considered is, whether a conveyance made to hinder, delay, or defraud the grantor's creditors is valid between the parties thereto, when there is a consideration to support it. The statute of frauds, so far as it applies to the case at bar, declares that "every conveyance . . . of any estate or interest in lands, . . . made with the intent to hinder, delay, or defraud creditors, . . . as against the persons so hindered, delayed, or defrauded, shall be void": Hill's Code, sec. 3059. While such conveyances are by the statute declared to be void as to the grantor's creditors, they are, nevertheless, by the great weight of authority, binding and valid between the parties: *Harris v. Harris*, 23 Gratt. 737; *Hess v. Final*, 32 Mich. 515; *Clemens v. Clemens*, 28 Wis. 637; 9 Am. Rep. 520; *Knapp v. Lee*, 3 Pick. 452; *Dyer v. Homer*, 22 Pick. 253; *Harbaugh v. Butner*, 148 Pa. St. 273; *Still v. Buzzell*, 60 Vt. 478; *Bump on Fraudulent Conveyances*, 2d ed. 436, 451; *Wait on Fraudulent Conveyances*, sec. 395. But in *Nellis v. Clark*, 20 Wend. 24, it is held that a contract void as to creditors is void between the parties to it, and, when such

contract is executory, it will not be enforced by the courts. The force of this authority is much weakened by the dissenting opinion of Nelson, C. J., in which he clearly distinguishes the difference between an illegal contract, in the strict sense of the term, and one fraudulent as respects creditors; the former kind being altogether ²⁰⁰ void, and the latter void only as against the persons hindered, delayed, or defrauded. In the case of *Harvey v. Varney*, 98 Mass. 118, Foster, J., in commenting upon the question under discussion, said: "*Nellis v. Clark*, 20 Wend. 24, was decided in the supreme court of New York in 1838, by Mr. Justice Cowen and Mr. Justice Bronson, and sustains the position which the present defendants maintain. But a dissenting opinion was delivered by the third judge, Chief Justice Nelson, now of the supreme court of the United States, the reasoning and conclusions of which commend themselves to our judgment in preference to the opinion of the majority of that court." And Steele, J., in *Carpenter v. McClure*, 39 Vt. 9, 91 Am. Dec. 370, also said: "We are aware that in *Nellis v. Clark*, 20 Wend. 24, the court, citing the case from Maine, have made the distinction between executed and subsisting contracts under a statute very similar to ours, and have put their decision substantially upon the grounds which have been so well set forth in the exhaustive and learned argument of the defendant's counsel. With great respect for the able court, the majority of whom concurred in that decision, we are unable to arrive at the same conclusion. So far as we are informed, contracts fraudulent as to creditors have been uniformly treated by our courts as not becoming thereby void between the parties; and such is clearly the spirit of our reported cases: *Gifford v. Ford*, 5, Vt. 532; *Conner v. Carpenter*, 28 Vt. 240; *Boutwell v. McClure*, 30 Vt. 676." It would be useless to cite further authority upon this subject, for, as was said by Dixon, C. J., in *Clemens v. Clemens*, 28 Wis. 637, 9 Am. Rep. 520: "It will be found, on examination, that these questions have been and are the subject of the most direct and positive conflict of opinion and decision among the courts of the different states of this Union, and sometimes among the courts of the same state."

²⁰¹ 1. Amid such a conflict of authority, it should be the duty of a court, when a question is raised for the first time, to adopt that line of decisions which, in its judgment, presents the better reason; and, with this object in view, we have carefully examined the numerous cases cited by counsel for both the plaintiff and defendant in their exhaustive briefs. It is admitted that where it appears from the plaintiff's own case, or by proper plea

of the defendant, that the contract which is the subject of the suit is void because illegal, the court will not lend its aid either to enforce on one hand or give relief on the other: *Buchtel v. Evans*, 21 Or. 309; *Ah Doon v. Smith*, 25 Or. 89. But there is a marked distinction between contracts which are void ab initio and those which are void only as to third parties: *Harris v. Harris*, 23 Gratt. 737. A contract which was void when executed cannot be made valid by ratification of the parties: *Wait on Fraudulent Conveyances*, sec. 489; *McIntosh v. Lee*, 57 Iowa, 356; *Atlee v. Fink*, 75 Mo. 100; 42 Am. Rep. 385. Nor is there any method whereby an illegal contract—one which never had life—can be rendered efficacious. A fraudulent conveyance is not void, but merely voidable at the suit of the creditor, and is therefore capable of ratification: *Bump on Fraudulent Conveyances*, 457; *Wait on Fraudulent Conveyances*, sec. 482. A contract entered into to defraud creditors is clearly against the policy of the statute of frauds, as well as against the general policy of the law; but it is not illegal in the strict sense of the term, for the wrong may be condoned by the creditor, and the transaction will thus become purged of the fraud: *Millington v. Hill*, 47 Ark. 301. The conveyance being valid between the parties to it, and not illegal in the strict sense of the term, it follows that the defendant should not have been ²⁰² permitted to plead the defense interposed, and there was error in overruling the demurrer.

2. The plaintiff was the owner of lot 5 in block 21, and, having executed a deed to the defendant for lot 5 in block 51, in which she had no interest, the question is presented whether there was any consideration for the note and mortgage. The plaintiff having in her complaint described the property as lot 5 in block 21 in Albina addition to Portland, Oregon, the defendant, in her second defense, inter alia, alleges that "said plaintiff, upon the seventh day of November, 1891, made, executed, and delivered to defendant a warranty deed to the following described real property in the county of Multnomah, state of Oregon, to wit, lot five (5), block fifty-one (51), Albina addition, Portland, with the frame buildings situated thereon, the same being the real property described in plaintiff's complaint; that no consideration whatever passed from defendant to plaintiff; that defendant has ever since held the deed to said property. At the same time, and as a part of the same transaction, defendant made her certain promissory note in words and figures as follows [here follows a copy of the note set out in the complaint]. And, at the same time, defendant made and executed a mortgage upon said prop-

erty, the same being the mortgage described in the plaintiff's complaint, said note and mortgage being made and executed without any consideration whatever." It is very evident from these allegations that the defendant did not intend to rely upon any failure of title to the lot which the plaintiff purported to convey to her as a defense to the suit. No attempt is made to allege that the plaintiff was not the owner of the lot described in her deed, or that, by reason of any failure of title thereto, there was no consideration for the note or mortgage. It is true, the defendant, upon filing her ²⁰³ answer, tendered a deed to the premises, but the rescission which she sought was in consequence of the alleged fraudulent transfer, and not because of any failure of title. A grantee of premises conveyed with warranty has a remedy upon the covenants of his deed for a failure of title, and if a perfect title be tendered by the grantor before a decree is rendered, the contract will not be rescinded, unless it appear to the court that the grantee has sustained some loss, injury, or damage by reason of the delay in perfecting the title: *Kimball v. West*, 15 Wall. 377; *Mays v. Swope*, 8 Gratt. 46; *Hughes v. McNider*, 90 N. C. 248. The plaintiff, before the decree was rendered, tendered a deed to the defendant, which contained a correct description of the premises, and there having been no proof of a demand for a rescission of the contract, nor any loss, injury, or damage sustained by the defendant by reason of any delay in perfecting the title, no rescission should be decreed.

3. That the deed was the consideration for the note and mortgage is admitted by the answer, in which it is alleged that they were executed at the same time, and as parts of the same transaction. When two contracts are contemporaneously executed by the same parties, and relate to the same subject matter, they must be construed together as constituting but one agreement: *Dean v. Lawham*, 7 Or. 422; *Kruse v. Prindle*, 8 Or. 158. The mortgage recited that it was given to secure the purchase price of the premises, and, while there was an error in the description contained in the deed, the subject matter related as well to the purchase price and security as to the property conveyed or mortgaged.

4. This brings us to a consideration of the delivery of the mortgage, the execution of which is admitted in ²⁰⁴ the answer. The statute provides that "the execution of a writing is the subscribing and delivering it, with or without a seal": *Hill's Code*, sec. 574; but, the defendant having denied the delivery, her pleading should be construed as a whole, and not by the use she

has made of the technical word "executed." The answer also alleges that the plaintiff agreed the defendant might retain possession of the mortgage. As the defendant bases her right to retain possession on plaintiff's agreement, she necessarily admits plaintiff's right to the possession but for such agreement. No lien could attach to the premises until the mortgage had been delivered by the defendant with the intent to give effect to the instrument: 1 Devlin on Deeds, sec. 260. Delivery is a question of fact, but this may be inferred from circumstances. The plaintiff testifies that after the mortgage had been properly signed, sealed, witnessed, and acknowledged, it was delivered to her, and that because the defendant had a safe, it was agreed that she should keep it. If this testimony is to be believed, the mortgage was executed, and the lien attached to the property. The agreement that the defendant should retain it recognizes the right of the plaintiff to contract with reference to it, and, in our judgment, corroborates the plaintiff's testimony. The mortgage having been delivered, the defendant has sustained no injury, even if the plaintiff adopted a ruse to secure its possession. In view of these considerations, the decree of the court below must be reversed, and one entered here foreclosing plaintiff's mortgage for the amount due on the note.

5. The note having provided for a reasonable attorney fee, the plaintiff alleged that five hundred dollars was such sum as the defendant promised to pay in case suit were brought thereon. The defendant denied that any sum was reasonable as such fee, and upon the issue ²⁰⁵ thus formed no evidence was taken, and consequently the statutory attorney fee only will be allowed.

Reversed.

ILLEGAL CONTRACTS—ENFORCEMENT OF.—No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act: Note to Lemon v. Grosskopf, 99 Am. Dec. 61. In an action between the parties to an illegal contract, a court will not lend its aid, either to annul it when executed, or to enforce it when executory. A court of equity will leave the parties to such an agreement where it finds them: Note to Bell v. Campbell, 45 Am. St. Rep. 514; Bernard v. Taylor, 23 Or. 416; 37 Am. St. Rep. 693; monographic note to Boyd v. Barclay, 34 Am. Dec. 765, on the rights of parties to illegal or fraudulent transactions. Deeds, conveyances, contracts, and other transactions, entered into in fraud of creditors, are valid between the parties, even where no consideration passes: See monographic note to Whitworth v. Thomas, 3 Am. St. Rep. 727-745, on recriminatory fraud; Gilbert v. Stockman, 81 Wis. 602; 29 Am. St. Rep. 922; Springfield Homestead Assn. v. Roll, 137 Ill. 205; 31 Am. St. Rep. 358. Transfers of property for the purpose of defrauding creditors are, however, voidable, if not void, as against creditors: Note to Whitworth v. Thomas, 3 Am. St. Rep. 729; Mason v. Vestal, 88 Cal. 396; 22 Am. St. Rep. 310; Johnston v. Harvy, 2 Penr. & W. 82; 21 Am. Dec. 426. There seems to be a want of har-

mony in the decisions as to whether notes and mortgages executed during a fraudulent transaction as to creditors may be enforced between the parties thereto: Note to Whitworth v. Thomas, 3 Am. St. Rep. 736. There are exceptions to the rule that courts will refuse to aid either party to a fraudulent transaction, entered into to defraud others, but they are very few. Such contracts are enforced or avoided, both at law and in equity, as may best answer the purpose of discouraging the fraud or contract against the policy of the law: Note to Whitworth v. Thomas, 3 Am. St. Rep. 742, 744.

Although a mortgage is executed by the mortgagor with intent to defraud his creditors, it is not fraudulent as to the mortgagee, unless he participated in the fraudulent intent: Sabin v. Columbia Fuel Co., 25 Or. 15; 42 Am. St. Rep. 756. To render a conveyance based upon a valuable consideration, and not fraudulent on its face, voidable and fraudulent as to creditors, there must have been mutuality of participation in the fraudulent intent on the part of both the vendor and the purchaser: See monographic note to State v. Mason, 34 Am. St. Rep. 395, on knowledge of vendee as affecting the validity of fraudulent conveyances. Deeds executed to evade the payment of a judgment that might be recovered against the grantor have been held fraudulent and void as to his creditors: Helms v. Green, 105 N. C. 251; 18 Am. St. Rep. 893; Rogers v. Evans, 3 Ind. 574; 56 Am. Dec. 537; Greer v. Wright, 6 Gratt. 154; 52 Am. Dec. 111, and monographic note thereto on claims against which voluntary conveyances may be avoided; Shean v. Shay, 42 Ind. 375; 13 Am. Rep. 366; because one having a cause of action is a creditor, within the meaning of the statute against fraudulent conveyances. If a transfer is made for the purpose of hindering, delaying, or defrauding the creditors of the grantor, it may be avoided by any of his creditors, prior or subsequent: See monographic note to Hagerman v. Buchanan, 14 Am. St. Rep. 745, on voluntary conveyances. In a state where contracts to defraud creditors are prohibited by statute, a note founded upon a consideration, but covinous, and designed by both parties to defraud creditors, is valid and binding as to the parties to it before performance, and void only as to creditors: Carpenter v. McClure, 39 Vt. 9; 91 Am. Dec. 370.

VENDOR AND PURCHASER—DEFECTIVE TITLE—RESCISSION.—A purchaser cannot be compelled to take a defective title, but a defect in the title may be removed within the time fixed for the completion of the purchase; Note to Burks v. Davies, 20 Am. St. Rep. 217. Equity will compel the vendee to take a defective title which becomes perfected at the time of the entry of a decree for specific performance: Note to Gregory v. Christian, 18 Am. St. Rep. 510. If a vendor fails for a great length of time to make title according to his bond, the purchaser may either sue at law for the breach or in equity for rescission: Humble v. Hinkson, 3 A. K. Marsh. 468; 13 Am. Dec. 195.

CONTEMPORANEOUS AGREEMENTS.—Two or more instruments executed at the same time, between the same parties, with reference to the same subject matter, must be construed together as forming but one contract: Notes to Appeal of Cornwall etc. R. R. Co., 11 Am. St. Rep. 894; Sutton v. Beckwith, 13 Am. St. Rep. 351.

DELIVERY OF INSTRUMENTS is a question of act and intent: Wilson v. Wilson, 49 Am. St. Rep. 176, and note; Weber v. Christen, 121 Ill. 91; 2 Am. St. Rep. 68; but the main element is the intention, as there may be a delivery without an actual physical transfer of possession: Weber v. Christen, 121 Ill. 91; 2 Am. St. Rep. 68; note to Stone v. French, 1 Am. St. Rep. 242. The delivery of a deed is complete when there is an intention manifested on the part of the grantor that it shall become effective as a conveyance. Whether such intent actually existed is a question of fact, to be determined by the circumstances of the case, and cannot, in the majority of instances, be declared as a matter of law: Martin v. Flaharty, 13 Mont. 96; 40 Am. St. Rep. 415. A mortgage must not only be delivered to, but must also be accepted by, the mort-

gagee, or the title does not pass; and it would seem that, to constitute delivery, the mortgage must pass under the power of the mortgagee or some person for his use, with the consent of the mortgagor: *Woodbury v. Fisher*, 20 Ind. 387; 83 Am. Dec. 325. But the intention is the substantive thing. If the facts attending the execution of the instrument show that the party executing it intended it to become immediately operative and binding without any further act or ceremony on his part, there is sufficient proof of an effective delivery, whoever may afterward take possession of the document: See monographic note to *Jones v. Jones*, 16 Am. Dec. 42, on necessity of delivery of deed.

NEGOTIABLE INSTRUMENTS—ALLOWANCE OF ATTORNEY'S FEES.—If, in an action upon a note stipulating for the payment of a reasonable attorney fee in case of suit, the answer denies that the amount claimed in the complaint is reasonable, an issue is thus raised, which must be tried either by the court or a jury: *Bowles v. Doble*, 11 Or. 474.

KERN v. HOTALING.

[27 OREGON, 235.]

EQUITY—POWER TO RESTORE CANCELED MORTGAGE. If a mortgagee takes a new mortgage in the place of an old one, not as payment, but in continuation of the old indebtedness, and cancels the old mortgage without knowledge of an intervening lien, although such lien is of record, equity will, in the absence of the intervening rights of third parties, and on the ground of mistake, restore and enforce the lien of the old mortgage, where he, relying upon a false abstract of title, was guilty of no negligence in not discovering the lien of record.

PAYMENT.—THE ACCEPTANCE OF A NEW NOTE AND MORTGAGE in renewal of an old indebtedness, and without any understanding that such indebtedness shall be discharged, is not a payment or discharge of the old indebtedness.

MORTGAGES—PAYMENT.—Nothing short of actual payment of the debt, or an express release, will operate to discharge a mortgage.

THE MAXIM THAT WHERE THE EQUITIES ARE EQUAL the law will prevail has no application where the equities are unequal by reason of the fact the plaintiff has a prior and superior equity. In such a case, the plaintiff's superior equity will prevail.

MISTAKE.—A LIEN discharged by mistake is, in contemplation of equity, still in existence.

EQUITY—MORTGAGE—ENFORCEMENT OF SUPERIOR EQUITY.—If one who expects to acquire title to land places a lien thereon, and, after obtaining his deed, gives a mortgage on the land for a part of the purchase price, the lien of the mortgage is paramount, where the mortgagee has not, through his own fault, surrendered or impaired his superior equity, and no disadvantage has accrued to the other party by reason of the mortgagee canceling his mortgage by mistake, and taking a new one in ignorance of the other party's equity.

Suit to have the cancellation of a mortgage set aside and revoked, and to have the mortgage reinstated, foreclosed, and declared a prior lien. In the summer of 1890, the plaintiff, J. W. Kern, negotiated for insurance on his life to the amount of fifty thousand dollars, with Frank Sperling, who was then the agent of the New York Life Insurance Company. At the same time,

Kern sold to Sperling block 18 in Waverly tract, in Multnomah county, the consideration being the first payment of premium on said insurance, amounting to two thousand six hundred and sixty-five dollars, and an additional sum of three thousand eight hundred and thirty-five dollars. On September 13, 1890, Kern executed and acknowledged a deed to Sperling for the property, and, on September 16, 1890, Sperling executed and acknowledged a mortgage to Kern upon the same property to secure the payment of the three thousand eight hundred and thirty-five dollars. For this amount, two notes were given, one dated June 24, 1890, for two thousand six hundred and sixty-five dollars, payable in one year; and the other, bearing the same date, for eleven hundred and seventy dollars, payable in two years. Both notes were at the rate of eight per cent per annum, and copies thereof were embodied in the mortgage. The reason why the notes were dated June, 24, 1890, was, that the first payment of premium was made payable on that date, the subsequent premiums being made payable annually thereafter. Before the negotiations could be finally closed, it was necessary to procure the insurance policy from New York, and the deed, mortgage, and notes were deposited with Charles Hirschtel and Thomas Connell in escrow, to be held by them until the policy could be obtained. The policy having been received, the papers were delivered on October 30, 1890, to the respective parties entitled thereto, and the deed and mortgage were recorded. On October 28, 1890, the defendant, the A. P. Hotaling Company, had loaned five thousand dollars to Sperling, payable one day after date, taking from him, as security therefor, a deed of general warranty to the same property, which was recorded May 16, 1892. On Sperling's notes the plaintiff collected two years' interest, but, not being able to make further collection, he left the notes, some time prior to May 22, 1893, with Lent and McGrew, real estate agents and brokers, with instructions to collect what they could, and, if they could not collect the principal, to get the interest and taxes, and to renew the notes, giving an extension of one year, with interest payable quarterly, at the rate of ten per cent per annum. The agents collected the interest and taxes to May 22, 1893, and, on that day, Sperling gave a new note for the full amount of the principal, aggregating three thousand eight hundred and fifty dollars, payable to T. S. McDaniel, a member of their firm, in one year, with interest at ten per cent per annum, payable quarterly. This new note was secured by a mortgage upon said block 18, given to McDaniel by Sperling and wife. On May 22, 1893, or the day following, the new note and

mortgage were indorsed to Kern by McDaniel, "without recourse," and, on May 23, 1893, Kern had the mortgage recorded. On May 27, 1893, Kern canceled of record Sperling's first mortgage of September 16, 1890. McDaniel never had any interest in the note and mortgage executed to him instead of to Kern, that being done as a mere matter of convenience in transacting the business. Before taking the new mortgage, Lent and McGrew had required Sperling to furnish them with an abstract of title to the property subsequent to September 16, 1890. Sperling did this, showing a clear title, excepting some taxes, the abstractor having overlooked the deed to the defendant. This abstract being relied upon, the new mortgage was accepted and recorded, and the old one canceled, in ignorance of the defendant's deed. The plaintiff discovered the condition of the record early in June, 1893, and, after a vain endeavor for some time to obtain a settlement, brought this suit on June 22, 1893, to have the cancellation of the mortgage of September 16, 1890, set aside and revoked, upon the ground that it was made through inadvertence and mistake; also, to have that mortgage reinstated, and to have it declared a prior and superior lien to that of the defendant. There was a decree in favor of the plaintiff, and the defendant appealed.

Dolph, Mallory & Simon, for the appellant.

Cleland & Cleland, for the respondent.

210 WOLVERTON, J. 1. There is no essential dispute as to the facts in the case, and the only question is as to whether, under this statement, the plaintiff is entitled to the relief demanded. "When a new mortgage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity, and given its original priority as a lien": Jones on Mortgages, sec. 971. This is the doctrine of many cases. In *Young v. Shaner*, 73 Iowa, 555, 5 Am. St. Rep. 701, the defendants John H. Shaner and Sarah B. Shaner were the owners in common of a parcel of land, which they mortgaged to Young to secure the payment of four hundred dollars, money borrowed. Thereafter, Witmer Brothers recovered judgment against John H. Shaner, who subsequently conveyed his interest to Sarah B. The latter then applied to Young for an additional loan of two hundred dollars, and, to secure time on the old loan of four hundred dollars, executed her note for six hundred dollars, and, to secure the same, executed a new mortgage upon the premises, which Young accepted, and canceled the old mortgage, in ignor-

ance of the Witmer ²¹¹ Brothers' judgment. The court held that the new mortgage, to the amount of the old, was to be regarded as a mere renewal, and that Young was entitled to have such amount declared as a lien superior to the Witmer Brothers' judgment, citing Bruse v. Nelson, 35 Iowa, 157, as in point, and as decisive of the case. The holding of the latter case is, in effect, that if A, holding a mortgage on the premises of C, in ignorance of a mortgage subsequently executed by C thereon, release his mortgage, and take a new one, equity will, as against C, or his assignee with notice, restore the lien of the first mortgage. In this case, an additional loan of one hundred and thirty-one dollars was obtained, but the court declared the lien to be superior, to the extent of the original indebtedness, to the mortgage subsequently executed. Geib v. Reynolds, 35 Minn. 331, was a case wherein plaintiff brought suit, as administrator of Dietrich Thole, deceased, to foreclose a certain mortgage, and to have it declared a lien superior to the lien of defendants. It appears that on May 5, 1877, Dieling and wife executed to Thole a mortgage on certain premises, to secure the payment of two thousand dollars, in accordance with the conditions of a promissory note, payable three years after date, bearing ten per cent interest. The mortgage was recorded July 9, 1877. On May 5, 1881, the debt not having been paid, Dieling executed a new note to Thole in renewal of the old loan, for the same amount, payable three years after date, with eight per cent interest for two years and seven per cent for the third, and executed a new mortgage to secure the same. The old note and mortgage were surrendered to Dieling, but the new mortgage was not recorded by Thole until December 21, 1881, nor was the old mortgage ²¹² satisfied until that date. On September 8, 1881, Dieling borrowed of Reynolds two thousand dollars, and also of Benjamin V. Quackenbush eleven hundred dollars, through one Livingston Quackenbush, who was their agent, and executed a mortgage to each of said parties to secure their respective loans, which were recorded September 20, 1881. At the time of obtaining these loans, Dieling exhibited to the agent the first note and mortgage to Thole, and told him that the mortgage, note, and debt had been paid, and the agent, relying upon the statement, made the loans. Presumptively, Thole had no notice of the execution and record of these mortgages when he canceled the old mortgage of record. The court say: "They [Reynolds and Quackenbush] acquired their rights before the discharge of the record of the Thole mortgage, and not upon the faith of that discharge. They are not, therefore, in position to

insist that they are injured by annulling that discharge. When a prior mortgage has been, by fraud or mistake, discharged of record, a subsequent mortgagee, who became such anterior to such discharge, cannot claim to be injured by setting aside the release, and restoring the mortgagee to his rights. . . . It is a familiar rule that if a holder of a mortgage take a new mortgage as a substitute for a former one, and cancel and release the latter in ignorance of the existence of an intervening lien upon the mortgaged premises, equity will, in the absence of some special disqualifying fact, restore the lien of the first mortgage, and give it its original priority. . . . The fact that the mortgage was released in ignorance of the existence of the intervening lien is deemed such a mistake of fact as to entitle the party to relief, and this although such intervening lien was of record at the time." It was accordingly held that Thole's mortgage was a ²¹⁸ superior lien to those of Reynolds and Quackenbush. In support of this doctrine see, also, *Robinson v. Sampson*, 23 Me. 388; *Cobb v. Dyer*, 69 Me. 494; *Barnes v. Mott*, 64 N. Y. 397; 21 Am. Rep. 625; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *West's Appeal*, 88 Pa. St. 341; *French v. De Bow*, 38 Mich. 709; *Stimpson v. Pease*, 53 Iowa, 572; *Jones on Mortgages*, secs. 966, 971.

It is clearly deducible from these authorities that the fact that the new note, executed for the aggregate amount of the two former notes, bears interest at an increased rate, and the further fact that the note and mortgage was made payable to McDaniel, instead of Kern, could have no significance, where it is manifest that it was the intention of the parties that the new note and mortgage should operate as a continuance of the old indebtedness, and not as a payment or discharge thereof. In *Pearce v. Buell*, 22 Or. 33, a case in point, Bean, J., says: "In such a case, a court of equity will look through the form to the substance, and keep alive the original security, if it can be done without injury to third parties. No rule is better settled than that if the holder of a mortgage take a new mortgage as a substitute for a former one, and cancel and release the latter, in ignorance of the existence of an intervening lien upon the mortgaged premises, although such lien be of record, equity will, in the absence of the intervening rights of third parties, restore the lien of the first mortgage, and give it its original priority." It is also settled that the acceptance of a note is not payment of an account, nor is the acceptance of one note in renewal of another payment thereof, unless it is so expressly agreed between the parties: *Black v. Sippy*, 15 Or. 576. See, also, *Geib v. Reynolds*, 35 Minn. 331.

And nothing short of actual payment of the debt or an express release will operate to discharge the mortgage: *Pearce v. Buell*, 22 Or. 33; *Jones on Mortgages*, ²¹⁴ sec. 924. That plaintiff canceled his old mortgage by mistake, and in ignorance of the A. P. Hotaling Company's deed, there is no doubt. Nor was he guilty of negligence in any degree in not discovering it of record, as he required an abstract of the record before he would consent to the renewal and a postponement of the time of payment. The abstract showing the record clear, Lent and McGrew, the agents of plaintiff, renewed the note and mortgage, granting an extension of time of payment, through the instrumentality of McDaniel, one of their firm. There was no agreement or understanding that the new note and mortgage should be accepted in payment of, or in discharge of, the old notes, nor was it so intended or understood by the parties, and, consequently, there was no payment or discharge of the old indebtedness.

2. The deed under which the rights of the defendant, the A. P. Hotaling Company, accrued was executed October 28, 1890, two days prior to the recording of plaintiff's old mortgage. Indeed, Kern's deed to Sperling had not been delivered or recorded at the time, and hence he had no interest which he could then convey or mortgage, and the company's deed could only take effect upon an after-acquired title. Plaintiff had no knowledge of the Hotaling Company's equity when he delivered the deed to Sperling, and he accepted the mortgage in return in good faith for value. This is not disputed. Sperling's title being thus encumbered with plaintiff's mortgage, the A. P. Hotaling Company therefore acquired its equity subject to such encumbrance. This being the condition of the company's lien prior to the execution of the new mortgage and the cancellation of the old, it has acquired no new rights by reason of the fact that the old mortgage was, through mistake and in ignorance of its equity, canceled of record, nor in reliance upon such cancellation. The maxim that ²¹⁵ where the equities are equal the law will prevail can have no application, because the equities are unequal by reason of the fact that the plaintiff possesses a prior and superior equity. A lien discharged by mistake is, in contemplation of equity, still in existence (*French v. De Bow*, 38 Mich. 709), and the A. P. Hotaling Company has acquired no additional equity in reliance upon the mistake of plaintiff. Hence, plaintiff's superior equity will prevail.

It was also contended by appellant that the equities of plaintiff and the A. P. Hotaling Company were acquired concurrently,

and that, such being the case, the land should be adjudged as a common fund for the indemnity of both parties, under the authority of *Fleischner v. Sumpter*, 12 Or. 166. While, in a sense, the equities of these parties became effective at the same time, simply because of the peculiar circumstances under which the respective deeds and the mortgage were delivered, yet we have seen that the plaintiff took a superior equity, which has not been surrendered or impaired through his mistake or inadvertence, and, no disadvantage accruing to the company through such mistake, there was no error in granting the relief demanded by plaintiff, and the decree of the court below will therefore be affirmed.

Affirmed.

EQUITY—MISTAKE—RESTORATION OF CANCELED MORTGAGE.—If a new mortgage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity, and given its original priority as a lien, where the rights of innocent third parties will not be affected: See monographic note to *Young v. Shaner*, 37 Am. St. Rep. 705, on the revival of mortgages when satisfied by mistake and the enforcement of a new mortgage as the continuation of the lien of a prior one: *Heisler v. Aultman*, 56 Minn. 454; 45 Am. St. Rep. 486, and note. Purchase money is the first lien on land: Note to *Demeter v. Wilcox*, 37 Am. St. Rep. 427.

PAYMENT—ACCEPTANCE OF NEW NOTE AND MORTGAGE FOR OLD ONES.—A mortgage is discharged only by payment or release, and not by a change in a renewal of the note or debt which the mortgage was given to secure: *Bunker v. Barron*, 79 Me. 62; 1 Am. St. Rep. 282, and note. The taking of a note, by a creditor, for an antecedent debt, does not extinguish the debt, unless it is received by express agreement as payment: Note to *Robinson v. Leach*, 48 Am. St. Rep. 809. A former debt cannot be extinguished by the acceptance of security or of an undertaking of equal degree, unless it is received in satisfaction, or is intended as an abandonment of the remedy on the first contract; and these are questions for the jury: *Yates v. Donaldson*, 61 Am. Dec. 283. This rule applies when a new note is received for an old one: *Hart v. Boller*, 15 Serg. & R. 162; 16 Am. Dec. 536. The taking of a new note in substitution for one secured by mortgage does not extinguish the debt evidenced by the latter so as to discharge the mortgage, unless such was the intention of the parties, shown by something besides what arises from the mere act of substitution: *Austin v. Bailey*, 64 Vt. 367; 33 Am. St. Rep. 932, and note.

MAXIMS—EQUAL AND UNEQUAL EQUITIES.—As between equal equities the law prevails: *Hunter v. Lawrence*, 11 Gratt. 111; 62 Am. Dec. 640; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390. As between equities unequal in point of time, but otherwise equal, the first in order of time must prevail; *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429, and note; *Ingram v. Morgan*, 4 Humph. 66; 40 Am. Dec. 626. If one party has an equity better than the other, priority of time is immaterial, and the superior equity must prevail: *Frost v. Wolf*, 77 Tex. 455; 19 Am. St. Rep. 761; note to *Walton v. Hargroves*, 97 Am. Dec. 434.

JOHNSTON v. BARRILLS.

[27 OREGON, 251.]

PAYMENT.—Acceptance of a note for the amount of a debt is not a payment thereof unless the parties expressly so agree.

EXECUTION.—A LABORER'S RIGHT TO PREFERENCE is not extinguished nor waived by his taking a negotiable note from his debtor for the amount due for wages.

EXECUTION.—PREFERENCES IN FAVOR OF LABORERS and employes do not include persons who own and operate thrashing machines.

LABORERS are those who perform with their own hands the contract they make with their employers, and not those who are mere contractors to have work done, and whose compensation is the profit realized on the transaction.

EMPLOYES.—This term embraces laborers and servants, and those occupying inferior positions.

PRESUMPTIONS.—It is presumed that regular and ordinary means are adopted for a given end. It will therefore be presumed when a claim is made for thrashing grain, that the work was done in the ordinary manner, by a thrashing machine, and not by mere manual labor.

EXECUTION.—PREFERENCE IN FAVOR OF WAGES does not extend to moneys due for thrashing grain in the ordinary manner by the aid of machinery.

Proceeding to establish and enforce a preferred claim to the proceeds of a sale of attached property. Two partners, doing business under the firm name of Johnston Brothers, commenced an action against the defendant, and attached a quantity of his grain. The firm of Brown & Jones intervened to establish a laborer's claim against the attached property, and, under the provisions of the statute referred to in the opinion, filed a statement of their claim, under oath, with the attaching officer, for one hundred and twenty-nine dollars and eighty-eight cents, for thrashing grain. The firm demanded the payment of one hundred dollars thereon, as preferred creditors, for services performed for the debtor within ninety days next preceding the attachment. The sheriff reported the statement of claim to the court, and the plaintiffs filed exceptions thereto as follows:

1. Said claim is not founded on a claim for wages; 2. Said claim is not the claim of an employe or laborer, but is, upon its face, and in fact, the claim of contractors; 3. That said claim is not such as is contemplated, provided for, or included in the act under which Brown & Jones seek to establish their claim as preferred; 4. That if said claim could, in the first instance, have been considered as a preferred claim, upon the attached property, the claimants have waived their right, so far as the plaintiffs are concerned, because they have received payment of their original debt and claim by receiving and accepting a negotiable promissory note for the full amount from the defendant debtor; 5. That the

taking and accepting of said note was, as to plaintiffs, full payment of the claim of Brown & Jones, under their alleged contract. An affidavit was filed showing on behalf of plaintiffs, that the Johnston Brothers were interested in the attached property to the extent of their demand against Barrills, as alleged in their complaint; and that the claimants had exhibited to affiant a note accepted by them from Barrills for the full amount of their thrashing debt. The court found that the exceptions and affidavit were sufficient to require the claimants to establish their demand by judgment. This they did not do, so the claim was rejected, and the proceeding dismissed. From this judgment the claimants appealed.

William Wilson, for the appellants.

Dufur & Menefee, for the respondents.

255 MOORE, J. Two questions are presented by the record for our consideration: 1. The sufficiency of the exceptions to the statement filed by the claimants; and 2. Whether they are entitled to be considered preferred creditors under the provisions of the act. The statute (Laws 1891, sec. 1, p. 81), in substance, provides that any person interested in the property which is sought to be subjected to the preferred claim of a laborer or employé may contest the claim, or any part thereof, by filing exceptions thereto, supported by affidavit, in the court having jurisdiction of the property, and thereupon the claimant shall be required to establish his claim by judgment in such court before any part thereof shall be paid. It will be observed that the first, second, and third exceptions are equivalent to a demurrer to the statement, except the allegation in the second that it "is, upon its face and in fact, a claim of contractors," but this allegation is not supported by affidavit; while the fourth and fifth exceptions present facts intended as a defense to the statement, and the affidavit refers to them only.

1. It is not alleged in any of the exceptions that the note was accepted by the claimants under an agreement between them and Barrills that it should discharge the debt of the latter for which it was given. "Nothing," says Lord, C. J., in *Black v. Sippy*, 15 Or. 574, **256** "is better settled than that accepting a note is not payment of an account, nor is accepting one note in renewal of another payment of the old note, unless there is an agreement that the note should be accepted in payment." From all that appears in these exceptions, the claimants may have taken the note as a mere evidence of the debt, and with no agreement or inten-

tion to accept it in payment of their account. As we view the statute, the exceptions therein provided for are in the nature of an answer to a petition in intervention, and should put in issue the material allegations of the claimants' statement, or some of them, before they could be required to take any steps looking to the establishment of their claim by judgment. If the taking of a negotiable promissory note on account of a precedent debt is to be presumed to be in satisfaction of it, as held in some states (2 Daniel on Negotiable Instruments, sec. 1260), it would have been unnecessary to allege any agreement between the claimants and Barrills on the subject: Bliss on Code Pleading, sec. 175; but this court, in Black v. Sippy, 15 Or. 574, having adopted the language of Lord Holt in Clark v. Mundal, 1 Salk. 124, that "a bill shall never go in discharge of precedent debt, except it be part of the contract that it should be so," the discharge of the debt on account of the thrashing cannot be presumed from the acceptance of Barrills' negotiable promissory note, and, not having alleged that the note was accepted under an agreement that it should be in payment of the account, it follows that such exceptions did not present any issue requiring further proceedings in support of the claim.

2. The act under consideration, so far as it applies to the case at bar, provides that when the property of any person shall be seized upon any process of any court of this state, then the debts owing to laborers or employes which have accrued by reason of their labor or employment, ²⁵⁷ to an amount not exceeding one hundred dollars to each employe, for work or labor performed within ninety days next preceding the seizure, shall be considered and treated as preferred, and such laborers or employes shall be preferred creditors, and shall first be paid; but, if there be not sufficient to pay them in full, the same shall be paid to them pro rata, after paying costs. Any laborer or employe desiring to enforce his claim for wages shall present a statement under oath, showing the amount due, after deducting all just credits and set-offs, the kind of work for which said wages are due, and when performed, to the officer or person charged with the execution of said process, within ten days after the seizure of the property on any execution or writ of attachment. The claimants, desiring to avail themselves of the foregoing provisions, filed with the said sheriff their statement under oath, from which it inter alia appears "that said firm was employed by the said Joseph Barrills on or about the third day of October, 1894, to work for said Barrills in thrashing the crop of grain raised by said Barrills during

the season of 1894, at the rate of five cents per bushel for wheat and four cents per bushel for oats; and that under said contract said firm began to work on the third day of October, 1894, and between that day and the eighth day of October, 1894, said firm performed work, services and labor five days, and thrashed eighteen hundred and twenty bushels of wheat, amounting to ninety-one dollars, and nine hundred and seventy-two bushels of oats, amounting to thirty-eight dollars and eighty-eight cents, and in the aggregate amounting to one hundred and twenty-nine dollars and eighty-eight cents. It will be observed, by an examination of the act, that its provisions ²⁵⁸ are intended to secure to a laborer or employé the benefit of his wages, when his employer's property has been levied upon by virtue of any judicial process. A proper definition of the terms "laborer," "employé," and "wages" becomes necessary to correctly interpret the act. Under a statute of Pennsylvania, quite similar to the one in question, the supreme court of that state held that laborers are those who perform with their own hands the contract they make with their employer: *Seider's Appeal*, 46 Pa. St. 57; and in a later case (*Wentroth's Appeal*, 82 Pa. St. 469), Mr. Justice Sharswood, in construing a similar statute, said: "The act meant to favor those who earned their money by the sweat of their own brows, not those who were mere contractors to have the work done, and whose compensation was the profit they would realize on the transaction." In *Campfield v. Lang*, 25 Fed. Rep. 128, it was held that one who performed service in sawing up lumber, which involved capital, machinery, and the labor of employés, was not a "laborer," and that a given compensation per thousand feet to be paid for sawing the lumber was not "wages," in the sense in which the terms were used in the statute. In *People v. Board of Police*, 75 N. Y. 39, Miller, J., in defining one of the terms, says: "Employés are usually considered as embracing laborers and servants, and those occupying inferior positions." From the whole scope and tenor of the act in question, it is apparent that the terms "laborer" and "employé," as there used, are synonymous, and relate to a class of persons who, by their own manual labor, earn a livelihood: *Endlich on Interpretation of Statutes*, sec. 99. The words "employer" and "employé" are doubtless the outgrowth of the old terms "master" and "servant," and have been adopted by reason of, and in deference to, the exalted position labor has acquired by the education of the masses.

²⁵⁹ 3. The statute has wisely provided an easy and speedy remedy by means of which the laborer or employé, in case the

property of his employer has been levied upon under judicial process, may obtain a portion, at least, of the wages due him for his manual labor. The act, however, being in derogation of the common law, should be strictly construed, and no person should be entitled to its benefits unless he is a "laborer," and makes a *prima facie* showing that his claim comes within its provisions.

4. There being in the statement no affirmative allegation that the grain was thrashed by machinery, or that the work involved capital and labor, and the allegation in the exceptions that "said claim is not the claim of an employé or laborer, but is, upon its face and in fact, a claim of contractors," not having been supported by affidavit, the question is presented whether the trial court committed an error by invoking the presumption that the grain was thrashed by a thrashing machine, and dismissing the claim upon such presumption. Mr. Rice in his work on Evidence, volume 1, section 30, in commenting upon a presumption of fact, says: "It is presumed that regular and ordinary means are adopted for a given end. So where the means calculated to attain a certain end appear to have been adopted, and the end itself appears to have been attained, a particular completion will be presumed." In a state like this, containing vast fields of wheat, barley, oats and rye, it cannot be presumed that any other mode of thrashing grain exists than by machinery. If, in those states which are noted for the quantity of grain annually raised, A engage B to thrash his crop of grain, and nothing is said about the means to be adopted to accomplish the result, can there be a doubt that the parties were contracting with reference to the implied fact that the grain was to be thrashed by a thrashing machine? Persons of ordinary intelligence would so understand and interpret ²⁸⁰ the contract, and there is no just reason why courts should assume a greater degree of ignorance. It must, therefore, be presumed, from an inspection of the claimants' statement, showing the rapidity with which the work was done, that the grain was thrashed by means of a thrashing machine, the operation of which involved an outlay of capital and the employment of labor, and that the work was not done by their manual labor alone. The claimants, not having been "laborers" or "employés," the compensation which they were to have received was not "wages," within the meaning of the act; and hence their claim was not entitled to preference, and the court committed no error in dismissing the proceedings.

It follows that the judgment must be affirmed, and it is so ordered.

PAYMENT—NOTE FOR ACCOUNT.—Taking a debtor's note does not extinguish the debt, unless it is so expressly agreed: *Note to Hanold v. Kays*, 8 Am. St. Rep. 841. An open account is not extinguished by taking a promissory note: *McMurray v. Taylor*, 30 Mo. 263; 77 Am. Dec. 611. Taking a note for goods sold and delivered does not extinguish the original cause of action: *Wyman v. Rae*, 11 Gill & J. 416; 37 Am. Dec. 70. A note is not evidence of a settlement of all demands between the parties prior to its date: *Ankeny v. Pierce, Breese*, 289; 12 Am. Dec. 174. A promissory note given in settlement of an account is only prima facie evidence of a discharge, and is open to explanation: *Perrin v. Keene*, 19 Me. 355; 36 Am. Dec. 759.

"LABORERS" AND "EMPLOYES"—WHO ARE.—"Laborers" are those persons who earn a livelihood by their own manual labor: *Consolidated Tank Line Co. v. Hunt*, 83 Iowa, 6; 32 Am. St. Rep. 285; note to *Briscoe v. Montgomery*, 44 Am. St. Rep. 194; *Wildner v. Ferguson*, 42 Minn. 112; 18 Am. St. Rep. 495; *Wakefield v. Fargo*, 90 N. Y. 213; *Mining Co. v. Cullins*, 104 U. S. 176. A contractor is not a laborer or employé: *Henderson v. Nott*, 36 Neb. 154; 38 Am. St. Rep. 720; *Vane v. Newcombe*, 132 U. S. 220; *Lehigh Coal etc. Co. v. Central R. R. Co.*, 29 N. J. Eq. 252; but a teamster employed by a contractor is a laborer: *Mann v. Burt*, 35 Kan. 10. A "laborer" is one who performs menial or manual services, and usually looks to the reward of a day's labor or service for immediate or present support: *Wakefield v. Fargo*, 90 N. Y. 213. The term "employé," in its ordinary and usual sense, includes all whose services are rendered for another; it is not restricted to any kind of employment or service, but includes the professional man as well as the common laborer: *Gurney v. Atlantic etc. Ry. Co.*, 54 N. Y. 358. As to the exemption of earnings or wages from execution and attachment, see monographic note to *Brown v. Hebard*, 91 Am. Dec. 411-425, showing who are "laborers" and what "wages" include under exemption statutes.

WAGES—PREFERENCES.—A strict compliance with the provisions of a statute giving a preference under execution sales for the wages of laborers is required to maintain claims for preferences: *Bixler v. Kresge*, 169 Pa. St. 405; 47 Am. St. Rep. 920; but a law allowing an exemption of wages is to be liberally construed: *Elliot v. Hall*, 2 Idaho, 1142; 35 Am. St. Rep. 285.

EVIDENCE—JUDICIAL NOTICE—PRESUMPTIONS.—Courts will take judicial notice of general customs: See monographic note to *Lanfear v. Mestier*, 89 Am. Dec. 664, on judicial notice. Parties are presumed to have dealt with reference to a general custom: *Bowman v. First Nat. Bank*, 9 Wash. 614; 43 Am. St. Rep. 870; note to *Mutual Assur. Soc. v. Scottish etc. Ins. Co.*, 10 Am. St. Rep. 826.

SHEAHAN v. DAVIS.

[27 OREGON, 273.]

NEGOTIABLE INSTRUMENTS.—AN ACCOMMODATION INDORSER cannot recover from the maker until he has paid and satisfied the demands of the indorsee.

NEGOTIABLE INSTRUMENTS—TITLE OF INDORSER—RELATION.—If an indorsement has been made in good faith, and the indorser has been compelled to pay a negotiable promissory note at or after its maturity, his title relates back to the date of his indorsement, and he thus becomes the lawful holder for value and without notice, although after his indorsement he may learn of the want or failure of the original consideration.

NEGOTIABLE INSTRUMENTS—LIABILITY OF MAKER TO ACCOMMODATION INDORSER.—The maker of a negotiable promissory note is liable to one who, without his request, indorses it for the accommodation of another, if such indorser is compelled to pay it upon default of the maker, although the indorser, after his indorsement, discovered that there was, originally, a want, or failure, of consideration for the note.

Action by Sheahan, an accommodation indorser, against Davis, the maker of two negotiable notes, to recover the amount he was compelled to pay to the holders thereof upon default of the maker. On November 7, 1892, Davis executed the two notes, payable to the order of J. C. McCaffrey, one for one hundred dollars, and the other for three hundred dollars, due in thirty and ninety days respectively. The consideration for the notes was McCaffrey's agreement to procure for Davis a conveyance of one hundred and sixty acres of school land in Lane county, Oregon, with the further understanding that, if the land should be unsatisfactory to Davis, he would, within three months, repurchase it, and repay the purchase price, and the expense of the examination. McCaffrey immediately transferred the notes for value, the smaller one to J. P. Smith, and the larger one to the Portland National Bank. Each note had the following indorsement: "For value received, we hereby waive protest, demand, and notice of nonpayment. (Signed) J. C. McCaffrey, E. J. Sheahan, G. Kutzschan." On November 17, 1892, Davis, not having received his conveyance, and having examined the land, and being dissatisfied with it, notified McCaffrey, who agreed to return the notes. He failed to do so, however, and Davis, having made default in their payment, Sheahan paid the amount of each to the holder thereof, and brought this suit, alleging, *inter alia*, that he indorsed the notes for Davis' accommodation, at his instance and request, and without any consideration therefor. Davis denied this allegation, and alleged that the indorsement was made entirely at McCaffrey's request. A trial was had upon the issue thus formed, and the jury was instructed that if Sheahan indorsed the notes for McCaffrey, at his request and for his accommodation, and not at the request, or for the accommodation, of Davis, the plaintiff could not recover. An exception to this instruction was allowed. There was a verdict and judgment for the defendant, and the plaintiff appealed.

Ralph R. Duniway, for the appellant.

Arthur C. Emmons, for the respondent.

²⁸⁰ MOORE, J. The question here presented is, whether the maker of a negotiable promissory note will become liable to one

who, without his request, indorses it for the accommodation of another, in case such indorser is compelled to pay it upon default of the maker. The rule is well settled that one who voluntarily and officiously pays the debt of another, without any request or authority to do so from the debtor, cannot recover from him the sum so paid: 2 Edwards on Bills and Notes, sec. 728; Byles on Bills, 273. The reason for this rule doubtless is, that by the voluntary payment of the debt, no privity of contract is created between the debtor and the person paying the debt; but when a creditor assigns the debt, though without the request of the debtor, a privity of contract between the assignee and the debtor is established. The maker of a negotiable note promises to pay at maturity, to the person lawfully holding it, the amount of money named therein, and an indorser of such note who, upon the default of the maker, satisfies the demands of the indorsee, and takes up the note, becomes the lawful holder, and may enforce the terms of the contract against all prior indorsers who have been notified of the dishonor, as well as against the maker, who, by putting such a note in circulation, invites indorsements thereof, which invitation, when accepted, creates a privity of contract between the maker and indorser: *Barker v. Parker*, 10 Gray, 339. If the plaintiff indorsed these notes to accommodate McCaffrey, his liability was equally as great as though ²⁸¹ he had at one time been the lawful holder for value, and transferred them in the ordinary course of business: 2 Randolph on Commercial Paper, sec. 692. The plaintiff having incurred this liability upon the faith of the maker's promise and the obligation of the payee's indorsement, shall the defendant be allowed to escape his liability as maker because he did not request the plaintiff to indorse these notes? It is true the plaintiff alleged he was an accommodation indorser for the defendant; but, having taken up the note upon the maker's default, his right of action depends upon the fact of his indorsement, and not upon the manner of it: 2 Randolph on Commercial Paper, sec. 743.

If the plaintiff, to accommodate McCaffrey, indorsed the notes in good faith, believing them to have been executed for a valuable consideration, and the indorsees discounted them before maturity, in good faith, without knowledge or notice of any infirmities therein, the plaintiff incurred a conditional liability, and, when the maker made default in their payment, his liability to the indorsees became fixed, and it was his duty to satisfy their demands, and take up the notes: 2 Randolph on Commercial Paper, sec. 747. Upon such a payment of the notes, the law subrogated

him to all the rights the indorsees had against the payee and maker; and he, being a bona fide holder, became entitled at once to proceed against the maker, and it could make no difference with his legal or equitable rights what he may have heard or ascertained in regard to fraud in the original consideration after his liability had been incurred: *Beckwith v. Webber*, 78 Mich. 390; for when an indorsement has been made in good faith, and the indorser has been compelled to pay and take up a negotiable promissory note at or after its maturity, his title relates back to the date of his indorsement, and he thus becomes ²⁸² the lawful holder for value and without notice, although after his indorsement he may learn of the want or failure of the original consideration. The indorsees having acquired these notes before maturity, for value, and without knowledge or notice of their want or failure of consideration, they had such a title as rendered the defendant liable to them for the amount thereof; and if the plaintiff indorsed them in good faith, believing that they had been executed for a valuable consideration, then, upon acquiring the title from the indorsees, the defendant became liable to the plaintiff for their payment; and it can make no difference whether the indorsement was made for the accommodation of another or for value, since an accommodation indorser cannot recover from the maker until he has paid and satisfied the demands of the indorsees. The defendant, by executing his negotiable promissory notes, impliedly requested the plaintiff to indorse them, and, having done so, a privity of contract between them was established, and it was error to instruct the jury that the defendant would not be liable thereon if the plaintiff, without his request, had indorsed them for McCaffrey's accommodation alone, for which reason the judgment is reversed, and a new trial ordered.

Reversed.

NEGOTIABLE INSTRUMENTS—RECOVERY BY ACCOMMODATION INDORSER AGAINST MAKER.—If a third person indorses a promissory note before maturity, without notice of any infirmity therein, and for the accommodation of the payee, who then negotiates the same, and such accommodation indorser pays the note in the hands of an innocent holder at maturity, he may recover the amount so paid from the maker: *Breckenridge v. Lewis*, 84 Me. 349; 30 Am. St. Rep. 353. The general law of accommodation paper, including the rights and liabilities of makers and indorsers, is the subject of a monographic note to *Altoona Second Nat. Bank v. Dunn*, 31 Am. St. Rep. 745-757, showing that an accommodation indorser who is obliged to pay the note to a holder for value may also maintain an action for the whole amount, as against a prior indorser.

WHITE v. JOHNSON.

[27 OREGON, 282.]

ACTIONS—SPECIAL APPEARANCE.—A party may appear specially in an action for the purpose of having the service of summons upon him, and an order continuing the action against him in a representative capacity, vacated, without giving the court jurisdiction to render a personal judgment against him.

A JUDGMENT BY DEFAULT can be taken only when it appears that the defendant has been duly served with the summons, and has failed to answer the complaint.

PROCESS—SERVICE OF SUMMONS.—Being “duly served with summons” implies that the defendant has been served with summons in the manner directed by law, in every particular, requiring him to appear in the court of the county where the judgment is taken.

ATTACHMENT—JURISDICTION AS TO SUBSTITUTED PARTIES—PERSONAL JUDGMENT.—No personal judgment can be rendered without service of summons on the defendant individually. By the allowance of a provisional remedy, such as the issuance of a writ of attachment, a court acquires jurisdiction to make substitution, and to order the action to be continued in the name of the personal representative of a deceased party, but the court, in such a case, is not invested with as full power to control “all the subsequent proceedings” as where there has been a service of summons.

PARTIES.—THE PROCEDURE FOR BRINGING IN NEW PARTIES, after the court has made an order to that effect, appears to be to amend the complaint by inserting therein such allegations as are necessary to make the persons omitted parties to the action, to insert their names in the summons, and, if they do not enter an appearance, to serve them with the amended summons and complaint, giving them the usual time allowed by statute to original parties in which to answer.

PARTIES SUBSTITUTED.—TO BRING IN A PERSONAL REPRESENTATIVE OF A DECEASED PARTY, where the original defendant in the action dies previous to the service of a summons upon him, or his appearance of record, the better practice is to take an order continuing the case against those who have succeeded to the interest of the deceased party, to file then a supplemental complaint showing the facts, and thereupon issue an alias summons containing the title of the action after substitution is made. A service of such a summons, with a copy of the complaint, gives jurisdiction of the substituted party.

PROCESS—SERVICE OF SUMMONS ON SUBSTITUTED PARTY—JUDGMENT BY DEFAULT.—If the defendant in an action dies after the issuance of the summons, but before it is served on him, and an order is made substituting his executrix, and continuing the action in her name, and thereafter the summons, entitled in the original action, and directed to the deceased, is served on the executrix, together with a copy of the original complaint and of the order requiring her to appear and plead, such service does not, under a statute providing that “the summons shall contain the names of the parties to the action, and the title thereof,” and shall be “directed to the defendant,” give the court any jurisdiction to render a judgment by default against her as executrix, or to render a judgment binding upon property attached in the action.

ATTACHMENT, ISSUANCE OF, BEFORE SUMMONS.—Under a statute allowing the plaintiff, “at the time of issuing the summons, or at any time afterward,” to have the property of the defendant attached, the summons must be issued at the time of, or prior to, the issuance of the writ of attachment. If the writ is issued before the summons, it is void.

ATTACHMENT, VOID—JURISDICTION—SUBSTITUTION OF PARTIES.—Under a statute giving the court jurisdiction in all proceedings from the time summons is served, "or the allowance of a provisional remedy," it has no jurisdiction, under a void attachment to make substitution of, and to continue the action against, the personal representative of a deceased defendant.

PROCESS—SUMMONS IS "ISSUED," WHEN.—Under a statute requiring that a summons shall be served by the sheriff, it is "issued" when it has been signed by the plaintiff or his attorney, and deposited with the sheriff for service. Until then it has no vitality for any purpose.

SHERIFFS—VERITY OF RETURN.—A sheriff's indorsement upon a summons, showing the date of its delivery to him, must be taken as true, and to import absolute verity, until impeached by some adequate proceeding. It will stand as against an affidavit of the plaintiff in the action contradicting it, in a subsequent proceeding in the same case to procure an order of substitution and continuance of the action in the name of the defendant's executrix.

Action by Isham White to recover of A. H. Johnson upon two promissory notes. The complaint was filed on April 16, 1894, and, on the same day, a writ of attachment was issued, which, as shown by the return of the sheriff, was received and served by him on that day by attaching certain real estate belonging to A. H. Johnson. A summons was also issued and placed in the hands of the sheriff. His indorsement showed that the summons was received by him on April 17, 1894. A. H. Johnson died on the — day of April, 1894, and the summons was not served upon him. On May 29, 1894, the plaintiff filed a motion for an order allowing the action to be continued against Cordelia Johnson, executrix of A. H. Johnson, deceased. This affidavit showed that the writ of attachment was issued and served on April 16, 1894, and, though not expressly so stated, it showed, at least, by strong implication, that the summons was delivered to the sheriff for service on that day. On May 31, 1894, the court made an order allowing the motion for a continuance, directing that a copy of the order and a copy of the complaint be served upon Cordelia Johnson, and that she have ten days after such service within which to plead to the complaint. On June 2, 1894, this order was served upon Cordelia Johnson and filed on that day. The original summons, directed to "A. H. Johnson, defendant," with proof of service, was also filed on the same day. On June 12, 1894, Cordelia Johnson, as executrix, appearing specially, moved to set aside the service of summons in the action and the order of court continuing the action against her, and requiring her to plead within ten days from the service of the order. On June 19, 1894, this motion was overruled, and, the executrix refusing to appear or plead further in said action, a judgment was entered against her as execu-

trix, on June 27, 1894, and the attached property was ordered sold to satisfy the same. On June 27, 1894, the proof of service of the original summons had been amended by leave of court so as to show that the original summons, the complaint, and the order of continuance were served upon Cordelia Johnson, on June 2, 1894, otherwise, there was no service of summons upon Cordelia Johnson. She appealed from the judgment against her, alleging: 1. That the court erred in making and entering its order continuing the action against her; 2. That the court erred in overruling her motion to set aside the service of the summons in said action, and the order of the court continuing the action against her as executrix, and directing a copy of the order, together with a copy of the complaint, to be served upon her, and requiring her to plead, upon the ground that the service of the summons was illegal, and the court without jurisdiction to make the order; 3. That the court erred in entering default against her as such executrix; 4. That the court erred in giving and entering judgment against her as such executrix, and in favor of the plaintiff.

Richard and Emmet B. Williams, for the appellant.

Cox, Cotton, Teal & Minor, for the respondent.

288 WOLVERTON, J. 1. The judgment herein was given and entered against the defendant, Cordelia Johnson, as executrix of the last will and testament of A. H. Johnson, deceased, for want of an answer. Her appearance in the action was special only, and for the purpose of having the service of the summons upon her and the order continuing the action set aside and vacated. This she could do without giving the court jurisdiction to render a personal judgment against her: *Kinkade v. Myers*, 17 Or. 470.

2. A judgment by default can be taken only when it appears that the defendant has been duly served with the summons, and has failed to answer the complaint: *Hill's Code*, sec. 249. "Being duly served with summons implies that the defendant has been served with summons in the manner directed by law, in every particular, requiring him to appear in the court of the county where the judgment is taken": *Trullenger v. Todd*, 5 Or. 38. Has the defendant, Cordelia Johnson, as such executrix, been duly served with the summons in the action so as to put her in default, she failing to appear generally or to plead to the complaint? In other words, was her substitution and the continuance of the action in her name by the court, and the subsequent

service of the summons upon her, entitled in the original action, and directed to ²⁸⁹ A. H. Johnson, together with a copy of the complaint and a copy of the order of the court showing her substitution for the defendant, and requiring her to appear and answer, or otherwise plead to the complaint, sufficient in law to require her to appear, at the peril of suffering a judgment by default to be entered against her? It is contended by counsel for White that the court had jurisdiction to make the order of substitution, basing their contention upon section 62 of Hill's Code, which provides that "from the time of the service of the summons, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings," and claiming that the issuance of the attachment was an allowance of a provisional remedy, and warranted the court in assuming jurisdiction to make the order. Granting, for the purpose of the examination of this question, that the writ was duly and properly issued, such issuance cannot be so construed as to invest the court with power to control all the subsequent proceedings in the action, as in case of the service of a summons. The jurisdiction acquired by the allowance of a provisional remedy, such as the issuance of a writ of attachment, is limited and qualified, and, in many respects, conditional: *Kelly v. Countryman*, 15 Hun. 97; *Waffle v. Goble*, 53 Barb. 517; *McCarthy v. McCarthy*, 13 Hun, 579. The writ being process, the court may exercise control over it, and prevent its abuse and perversion for the purpose of oppression: *Morgan v. Avery*, 7 Barb. 659. The court may also, upon condition that the writ is served and property attached under it, direct the publication of a summons against a defendant who is a nonresident, or absent from the state, or in concealment to prevent a personal service: *Pennoyer v. Neff*, 95 U. S. 727. And a final subjection of the property attached to the payment of a demand is always dependent and conditional ²⁹⁰ upon a valid judgment subsequently obtained, upon the service of a summons upon the defendant, either personally or constructively, or upon his appearance in the action.

Under a statute in Minnesota (Gen. Stats. 1878, c. 66, sec. 69, now Gen. Stats. 1894, sec. 5209), providing that, "from the time of the service of a summons in a civil action, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings," it has been held that where the defendant dies after the publication of the summons in an action against him had been commenced, but before it had been published the

full six weeks required by statute, the court had no jurisdiction to make an order of substitution continuing the action against his executrix: *Auerbach v. Maynard*, 26 Minn. 421. In that case Berry, J., says: "Then, under section 69 (Gen. Stats. 1894, sec. 5209), from the time when the service is thus complete, 'the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings.' If the party upon whom the service is being made dies before it is complete—that is, before the required publications have been made—the service cannot be completed, there being no person in being upon whom to make it; and whatever has been done, short of complete service, is of no avail, and the court acquires no jurisdiction through it." Thus, it appears that the court is without power or authority to take any action looking to the rendition of a personal judgment merely, without first obtaining jurisdiction through the service of a summons upon the defendant. Aliter, from the time of the service of summons the court has control of all subsequent proceedings. The statute of Minnesota stops short of the provisions of section 62 under consideration, but the judicial interpretation thereof in *Auerbach v. Maynard*, 26 Minn. 421, ²⁹¹ serves as a guide to the interpretation and construction of section 62 of our statutes to the extent that it is in harmony with the Minnesota statute. Our section 62 further provides that the court shall be deemed to have acquired jurisdiction, and shall have control of all subsequent proceedings, from the time of the allowance of a provisional remedy. The language employed in conferring jurisdiction is the same in either case, whether by the service of a summons or the allowance of a provisional remedy, but it is very evident that the powers acquired thereby are not the same, and hence not coequal nor coextensive. The purpose of a provisional remedy, as understood and employed by the code, is to give the plaintiff temporary security pending the action, which must abide the determination thereof. An attachment in this state, as elsewhere, is regarded as a quasi proceeding in rem, and is known under the statute as a provisional remedy, the express purpose of which is to acquire a lien upon the property of the debtor, temporary in its nature, to await the final judgment of the court touching the action, in connection with which the proceeding is brought into requisition. The court is empowered, through the allowance of a provisional remedy, thereafter to take whatever action may seem necessary and proper, looking to the acquirement, preservation, and perfection of the lien. The proceeding is simply auxiliary to the main case. The service of the

summons confers jurisdiction of the person, and the allowance of the provisional remedy gives jurisdiction of the subject matter of the auxiliary proceedings, and each particular kind of jurisdiction confers upon the court its peculiar powers, and none other. So it has been held that the court acquires, by the allowance of a provisional remedy, jurisdiction to make substitution, and to order the action continued in the name of the personal representatives of ²⁹² a deceased party, upon the ground that such action of the court is necessary and proper to put the suit in such a condition that plaintiff can enforce his provisional lien: *More v. Thayer*, 10 Barb. 259. And this is probably the correct doctrine.

3. But a question of much greater complication is as to whether the defendant, Cordelia Johnson, has been properly served with a summons or with process of the court, so as to give it jurisdiction to render judgment against her by default; and herein is involved the proper practice of the court in making substitution, and bringing the substituted party before it. The procedure for bringing in new parties after the court has made the order to that effect appears to be to amend the complaint, by inserting therein such allegations, as are necessary to make the persons omitted parties to the action, and to insert their names in the summons, and, if they do not enter an appearance, to serve them with the amended summons and complaint, giving them the usual time allowed by statute to original parties in which to answer: *Fitman's Trial Procedure*, sec. 351; *Penfield v. Wheeler*, 27 Minn. 358.

4. Bringing in a new party is somewhat analogous to bringing a personal representative of a deceased party before the court, where the deceased was not served with the summons in the action. Section 38 of Hill's Code provides that "no action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representative or successor in interest." It has been held in New York and California, under statutes similar to this, that all that is necessary ²⁹³ to put the case in condition to proceed is to obtain an order, upon proper notice, directing that the action be continued against those who have succeeded to the interest of the deceased party: *Gordon v. Sterling*, 13 How. Pr. 405; *Coon v. Knapp*, 13 How. Pr. 175; *Allen v. Walter*, 10 Abb. Pr.

879; *Emerie v. Alvarado*, 64 Cal. 529; *Lyles v. Haskell*, 85 S. C. 391; *Judson v. Love*, 35 Cal. 469. But in none of these cases had the original defendant in the action died previous to a service of summons upon him or his appearance of record. The statute provides that the court may, at any time within one year after the death of a party, on motion, allow the action to be continued against the personal representative, but no provision is made, in a case of this kind, as to the manner of bringing in the substituted party. The court could, therefore, adopt any reasonable procedure that might seem proper, but the service of a valid summons could not be dispensed with. Probably, the better practice would have been for the lower court to have required the plaintiff to file a supplemental complaint in the action, showing the death of defendant and the appointment of the executrix, and thereupon to issue an alias summons containing the title of the action after substitution made, and have the same directed to the said Cordelia Johnson. A service of such a summons, together with a copy of the complaint, would undoubtedly suffice to require her appearance, in default of which judgment might have been entered against her. Such a practice and procedure seems reasonable, and well calculated to effect the desired result in an orderly manner.

5. By the order of substitution in the case at bar, the action was continued against Cordelia Johnson, the personal representative of the deceased defendant, upon whom the summons had not been served; so that, assuming that she had notice of the order of substitution, and ²⁹⁴ that the same was regularly entered, she would simply step into the shoes of A. H. Johnson, who had not had his day in court, and it was just as essential that she should have her day in court as that A. H. Johnson should have had his in the first instance. We take it, therefore, that before a valid judgment can be entered against her, whether as executrix, or to be of binding force and effect to the extent only of the property attached, she must be served with notice in the manner provided by law, as she refuses to voluntarily submit to the jurisdiction of the court. The statute has prescribed but one form of notice through which the court may acquire jurisdiction of the person, and that is, by summons, which, although not process, has the force and effect thereof, and, if not obeyed, will put the party in default. Section 52 of Hill's Code provides that "the summons shall contain the name of the court in which the complaint is filed, the names of the parties to the action, and the title thereof. It shall be subscribed by the plaintiff or his attorney,

and directed to the defendant, and shall require him to appear and answer the complaint, as in this section provided, or judgment for want thereof will be taken against him." These requirements are mandatory, and not directory merely: *Lyman v. Milton*, 44 Cal. 630. Section 55 provides that the service shall be by delivering a copy thereof, together with a copy of the complaint. Now, the summons served upon Cordelia Johnson in form filled the requirements of the statute, but Mrs. Johnson's name was not contained in the title, nor was it directed to her. So far as appears from the summons itself, it contained nothing which could or would inform her that she must appear in obedience to its mandate. So, with the copy of the complaint with which she was served, she is nowhere mentioned as a party litigant, either in her individual or representative capacity. She ²⁹⁵ was informed by the order served with the summons and complaint that the action had been ordered continued against her as the executrix of A. H. Johnson, deceased; and she was advised thereby that she would have ten days after service within which to plead to the complaint. Is all this sufficient to put the administratrix in default after the lapse of ten days from service, and to invest the court with jurisdiction to enter judgment against her in her representative capacity? Can it be said that she was served with the summons in the action, substantially such as the law directs?

If A. H. Johnson had lived, and the court had simply made an order after the allowance of the writ that he have ten days after service of a copy of the order and complaint to plead thereto, and service had been made as required by the order, it must be conceded that the proceeding would not have been equivalent to the issuance and service of a proper summons upon him. A noncompliance with the order would not have put him in default. The order of the court in the present case, including its service with a copy of the complaint, could scarcely have a different or more vital effect, and the fact that she was served with a copy of the summons in which her name was nowhere mentioned could not add to the force of the proceeding. If Johnson had been served with the summons, and substitution made thereafter, the case would be different, as the representative, having due notice of the substitution, would take the case up at the point where, and in the condition in which, the predecessor left it. Judge Rumsey, in his work entitled *Rumsey's Practice*, vol. 1, page 666, says: "Where the action is revived, the issue and proceedings are taken up at the point where the death of the party as to whom the change is made left them; the new or substituted party takes the

the record of the sheriff, but its effect is to contradict it, to say the least. The court below made the order continuing the action in the name of the executrix upon the affidavit alone. The summons showing the date of the receipt was not before the court, as it had not been returned. Apparently, the indorsement was not considered material either by the counsel or the court, but the view we take of the case renders it highly important. The question whether the court had power to make the substitution hinges upon the further question as to ²⁰⁰ which of these records imports the truth as to the date of the issuance of the summons. As a general proposition, as against parties to the record or their privies, the sheriff's return imports absolute verity, and it cannot be impeached, except by some direct attack: 22 Am. & Eng. Ency. of Law, 193; but here no effort is made to get clear of, or set aside, the sheriff's indorsement, and, treating it as of no vitality, the court is asked to disregard it, and proceed with the case as if none had been made. To thus treat it would be to say the indorsement was an absolute nullity for any purpose and in any proceeding, whether collateral or direct. We think that while the indorsement of the sheriff showing the date of a delivery of the summons to him stands unimpeached, and not set aside or otherwise vacated by any adequate proceeding for that purpose, it must be taken as true and to import absolute verity, as against an affidavit of the plaintiff in the action contradicting it, in a subsequent proceeding in the same case to procure an order of substitution and continuance of the action in the name of the executrix. For these reasons, and looking to the record in the case made at the instance of the plaintiff and by the sheriff, an officer of the court, and in the line of his duties as prescribed by the statute, all which remain unassailed and unimpeached, we conclude that the summons had not issued at the time of the issuance of the writ of attachment, nor was it issued until the day subsequent to the issuance of the attachment. Therefore, the allowance of the provisional remedy was without authority of law, and void, and it was error in the court below to grant the order allowing the action to be continued against Cordelia Johnson, the executrix. The judgment of the court below is reversed, and the cause remanded for such other proceedings as may be deemed advisable, not inconsistent with this opinion.

Reversed.

Bean, C. J., expressed no opinion.

ACTIONS.—A SPECIAL APPEARANCE for a special purpose may be made without conferring jurisdiction over the person: Note to

Union Pac. Ry. Co. v. De Busk, 13 Am. St. Rep. 233; Green v. Green, 42 Kan. 654; 16 Am. St. Rep. 510.

JUDGMENT BY DEFAULT—SERVICE OF PROCESS—JURISDICTION.—Any means of acquiring jurisdiction is properly denominated process: Wilson v. St. Louis etc. Ry. Co., 108 Mo. 588; 32 Am. St. Rep. 624. Notice is necessary to give a court jurisdiction of the person, and unless it is acquired in some mode, the judgment of the court is a mere nullity: Ex parte Cheatham, 6 Ark. 531; 44 Am. Dec. 525. If the defendant neither appears nor is served with process, a judgment against him is void: Hobby v. Bunch, 83 Ga. 1; 20 Am. St. Rep. 301; Williams v. Preston, 3 J. J. Marsh. 600; 20 Am. Dec. 179; Ditch v. Edwards, 1 Scam. 127; 26 Am. Dec. 414; Shaefer v. Gates, 2 B. Mon. 453; 38 Am. Dec. 164. Personal service cannot be dispensed with, except in cases distinctly provided for by statute: Note to Renier v. Hurlbut, 29 Am. St. Rep. 855. No one shall be personally bound until he has had his day in court: Furgeson v. Jones, 17 Or. 204; 11 Am. St. Rep. 808. A judgment by default, where defendant was not served, or did not appear, is erroneous, the proceedings being coram non judice: Ditch v. Edwards, 1 Scam. 127; 26 Am. Dec. 414; Shaefer v. Gates, 2 B. Mon. 453; 38 Am. Dec. 164.

JURISDICTION.—ATTACHMENT OF PROPERTY does not confer jurisdiction over the defendant; and the attachment is void if it issues before the summons: Note to Langtry v. Wayne Circuit Judges, 13 Am. St. Rep. 354.

SHERIFF'S RETURN imports absolute verity, is conclusive as between the parties, and cannot, as a general rule, be impeached except by some direct attack: McDonald v. Leewright, 31 Mo. 29; 77 Am. Dec. 631; Stinson v. Snow, 10 Me. 263; 25 Am. Dec. 238; Phillips v. Elwell, 14 Ohio St. 240; 84 Am. Dec. 373; Stewart v. Duncan, 47 Minn. 285; 28 Am. St. Rep. 367. The return will, if contradicted, be sustained by the court, unless it clearly appears from the evidence that it is false: Wilson v. Shipman, 34 Neb. 573; 33 Am. St. Rep. 660.

New Parties; How Jurisdiction Over may be Acquired.

Jurisdiction and Process, Generally.—The cases showing how jurisdiction may be acquired over new parties are not numerous, but what there are seem to show that, as a general rule, where new parties defendant are made, pending the action, jurisdiction over their persons must be obtained in the same way that would have been necessary if they had been made parties in the beginning. And this, of course, is by service of process. This is the mandate of the court, and the means whereby the defendant in a suit is compelled to appear in court, and whereby the effect of the suit is secured to the successful party. It is a violation of one of the first principles of justice to try or to decide upon the rights of an individual, either civilly or criminally, without notice. It has been said, in a well-considered case, that "to decide upon the rights of parties who have received no notice is always full of hazard. Indeed, so far does the common law carry its dread of ex parte proceedings, it is one of its maxims, 'that he who decides, one party being unheard, does wrong, though he may decide right'": Eskridge v. Jones, 1 Smedes & M. 595. To obtain jurisdiction of the person, notice is indispensable, unless waived by appearance, which is equivalent to notice, or by consent, and it follows that a judgment without notice, either actual or constructive, or waiver, is a nullity: Hale v. Finch, 104 U. S. 261; Settlemier v. Sullivan, 97 U. S. 444; Windsor v. McVeigh, 93 U. S. 274, 277; Harris v. Hardeman, 14 How. 334; Dearing v. Bank of Charleston, 5 Ga. 497; 48 Am. Dec. 300; Ex parte Cheatham, 1 Eng. 531; 44 Am. Dec. 525; Wood v. Watkinson, 17 Conn. 500; 44 Am. Dec. 562; Swiggart v. Harber, 4 Scam. 364; 39 Am. Dec. 418; Starbuck v. Murray, 5 Wend. 148; 21 Am. Dec. 172. A constructive service of summons is often sufficient: Anderson v. Sutton, 2 Duvall, 480; but some process must appear on the face

of the record, or the judgment is void. Thus, if the record shows neither personal service, publication, nor other notice, there is a clear want of jurisdiction: *Easterly v. Goodwin*, 35 Conn. 273; *Karr v. Karr*, 19 N. J. Eq. 427; *McGahan v. Carr*, 6 Iowa, 331; 71 Am. Dec. 421; *Commissioners v. Low*, R. M. Charl. 298; *Weeks v. Merritt*, 5 Robt. 610. The mere fact that a person is in the presence of a court does not authorize a judgment against him. He must be brought in by legal means, or must have appeared voluntarily by pleading: *Jones v. Kenny*, Hardin, 103. A judgment against a person on whom no service of process has been made, or appearance entered, is void: *Coudry v. Cheshire*, 88 N. C. 375. There is an obvious distinction between a total want of service of process and a defective service, as to their effect in judicial proceedings. In the one case, a judgment or decree is coram non iudice and void; in the other, the defective service gives the defendant actual notice of the proceedings against him, and the judgment or decree, although erroneous, is not void, until reversed by a direct proceeding in an appellate tribunal, and its validity cannot be collaterally called in question: *Harrington v. Wofford*, 46 Miss. 31. If service of process is not void, but merely defective, as by reason of an error in the copy of the summons, the jurisdiction is not affected: *Irions v. Keystone Mfg. Co.*, 61 Iowa, 406. A court cannot exercise equity jurisdiction, unless the case is before it on equity process: *Norton v. Preston*, 15 Me. 14; 82 Am. Dec. 128; *Karr v. Karr*, 19 N. J. Eq. 427.

New Parties—Necessity of Process—Practice.—These principles are applicable to new parties defendant, as well as to the original parties. It is sometimes necessary to add new parties defendant, and courts have power, under the reformed procedure, created by the adoption of codes, to order all necessary parties to be brought in, and this they may do of their own motion whenever it is necessary for the full and complete administration of justice. But, while a court has power to order a pleading amended, and the proper parties to be brought in, it is not bound to exercise such power, and it may dismiss the complaint without prejudice to the right to bring another action: *Knapp v. McGowan*, 96 N. Y. 75. In some jurisdictions, new parties plaintiff or defendant cannot be brought in by way of amendment: *Ayer v. Gleason*, 60 Me. 207; *Winslow v. Merrill*, 11 Me. 127; *Chouteau v. Hewitt*, 10 Mo. 131; *Chamberlin v. Hite*, 5 Watts, 373; *Wilson v. Wallace*, 8 Serg. & R. 53; *Noll v. Swineford*, 6 Pa. St. 187; *McWilliams v. Anderson*, 68 Ga. 772; but in other jurisdictions, and in some of the states where a different rule formerly prevailed, new parties plaintiff or defendant may be brought in by way of amendment: *Seitz v. Buffum*, 14 Pa. St. 69; *Owen v. Weston*, 63 N. H. 599; 56 Am. Rep. 547; *Walthour v. Spangler*, 31 Pa. St. 523; *Lewis v. Darling*, 16 How. 1; *Hook v. Brooks*, 24 Ga. 175; *Montague v. King*, 37 Miss. 441; *Mead v. Bagnall*, 15 Wis. 156; *Chapin v. Ourtenius*, 15 Ill. 427; *Goddard v. Pratt*, 16 Pick. 412; *Powell v. Myers*, 1 Barb. 427; *Green v. Deberry*, 2 Ired. 344; and it is probably the general practice to bring in new parties by way of amendment. But another method of bringing in new parties is by way of a cross-bill or cross-complaint, or supplemental bill: *Hungerford v. Cushing*, 8 Wis. 332; *Prouty v. Lake Shore etc. R. R. Co.*, 85 N. Y. 272; *Winter v. McMillan*, 87 Cal. 256; 22 Am. St. Rep. 243; *Chalmers v. Trent*, 11 Utah, 88, 99; though it is held in *Shields v. Barrow*, 17 How. 130, 145, that new parties cannot be introduced into a cause by a cross-bill. In this case, it is said that, "if the plaintiff desires to make new parties, he amends his bill, and makes them. If the interest of the defendant requires their presence, he takes the objection of nonjoinder, and the complainant is forced to amend, or his bill is dismissed. If, at the hearing, the court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject, and a cross-bill to make new parties is not only improper and irregular, but wholly unnecessary." In *Bailance v. Underhill*, 3 Scam. 453, 461, it is said that, "so far as the practice and proceedings are concerned, there is no difference between a cross and an original bill. It is, in fact,

a separate and distinctive suit, commenced by filing the bill, which, it is true, must be confined to the subject matter of the original suit, to answer which the defendant in the cross-bill must be brought into court in the same manner as he would be in any other case." When a supplemental bill is filed, bringing new parties into court, it is, as to them, a new suit, and is to be considered as being commenced when the supplemental bill is pleaded in office: *Morgan v. Morgan*, 10 Ga. 207. Under the code of Missouri, the court may order the necessary parties to be "brought in, either by an amendment of the petition, or by a supplemental petition and a new summons": *Butler v. Lawson*, 72 Mo. 227. If suit is brought against a female, who subsequently marries, her husband must be made a codefendant; and this should be done, and an averment of the marriage be made, by a supplemental complaint, and not by an amendment of the original complaint: *Van Maren v. Johnson*, 15 Cal. 308.

But in whatever way new parties are brought in, it is necessary, in order to acquire jurisdiction over them, to serve them with process, unless they voluntarily appear or waive such service. There is no way of bringing a party into court, and within its jurisdiction, against his will, but by the service of process: *Akin v. Albany etc. R. R. Co.*, 14 How. Pr. 337; *Walkenshaw v. Perzel*, 32 How. Pr. 310; *Bray v. Creekmore*, 109 N. C. 49; *Powers v. Braly*, 75 Cal. 237; *Pico v. Webster*, 14 Cal. 202; 73 Am. Dec. 647; *Morgan v. Morgan*, 10 Ga. 297; *Rigney v. Rigney*, 127 N. Y. 408; 24 Am. St. Rep. 462; *State v. Burke*, 37 La. Ann. 231; *Thompson v. Allen*, 86 Mo. 85; *Ballance v. Underhill*, 3 Scam. 453; *Fletcher v. Holmes*, 25 Ind. 458; *Lowenstein v. Glidewell*, 5 Dill. 325; *People v. Woods*, 2 Sand. 652; *McRae v. Guion*, 5 Jones Eq. 129; *Voight v. Schenck*, 54 Hun, 548; *Plemmons v. Southern Imp. Co.*, 108 N. C. 614; *Dunphy v. Riddle*, 86 Ill. 22; *Crowl v. Nagle*, 86 Ill. 437.

Thus if, after a default, the plaintiff amends his complaint, not in mere matter of form, he must serve the same on the defendant. A judgment entered thereon without such service is irregular: *People v. Woods*, 2 Sand. 652. If a bill is amended so as to make a corporation a party, it is proper to serve the president of the corporation with a copy of the bill, although he is already before the court in his individual capacity: *McRae v. Guion*, 5 Jones Eq. 129; but the special appearance of the counsel of a corporation does not bring it into court for the purposes of the action; and if the corporation has not been served with summons, except as issued against "A. H. Bronson, President," etc., which is legally a summons and service only upon A. H. Bronson, individually, the corporation is not in court, and cannot be brought into court, except by service of process upon it: *Plemmons v. Southern Imp. Co.*, 108 N. C. 614. Where an amended petition has been filed, but has not been served, and judgment has been rendered as prayed for therein, it must, of necessity, be reversed: *State v. Burke*, 37 La. Ann. 231. So, if an original petition states a cause of action against individuals, as constituting a copartnership, and the amended petition states one against a corporation, the latter, before the court can have jurisdiction to render judgment, must be in court on voluntary appearance, or be brought in by service of process, and this is so although the firm name was the same as that of the corporation, and the stockholders in the latter composed said firm: *Thompson v. Allen*, 86 Mo. 85. The service of an amended complaint, upon a person who is brought in thereby for the first time as a defendant, without a service of the summons upon him, is void: *Powers v. Braly*, 75 Cal. 237. So, a personal decree against a surety on the bond of a purchaser at a judicial sale is void, where it is rendered upon a rule against him and his surety, upon the latter's failure to pay. There is a want of jurisdiction over the person of the surety. He does not deal directly with the court, and so become a party to the suit: *Anthony v. Kasey*, 83 Va. 338; 5 Am. St. Rep. 277. Parties not sued in an action of trespass cannot be brought in by mere notice, where there is no pretense that they were trespassers. They must have legal notice, which is the notice required by statute, or make voluntary appearance as parties to

the record: *Pico v. Webster*, 14 Cal. 202; 73 Am. Dec. 647. There must be service of process on the defendants in a cross-bill, unless they voluntarily appear: *Fletcher v. Holmes*, 25 Ind. 458; *Lowenstein v. Glidewell*, 5 Dill. 325; and, where a supplemental bill is filed, new parties must be served with process: *Shaw v. Bill*, 95 U. S. 10, 14. A resident of one state cited as a warrantor in a suit in another state, at the request of the defendant in such suit, but with no notice to him, except the appointment of a curator ad hoc, to represent him in the suit, is not bound by a judgment rendered therein: *Flowres v. Foreman*, 23 How. 132. If a new party defendant is brought into a suit to enforce a mechanic's lien by amendment of the petition, the suit as to him is brought only from the time he is made a party, and it can have no relation back, so far as he is concerned, to the time of bringing suit against the original defendants: *Dunphy v. Riddle*, 86 Ill. 22; *Crowl v. Nagle*, 86 Ill. 437. A new party is not bound by depositions taken, or testimony given, in the action prior to his being made a party: *Lange v. Braynard*, 104 Cal. 156.

An order of court and service of notice, making a person a party defendant to an equitable proceeding, is as effective as an amendment of the petition bringing in such party and repeating the allegations: *McGregor v. McGregor*, 21 Iowa, 441, 454. Parties as to whom a bill has been dismissed by the complainant after a decree can only be brought back by the usual process. An order, therefore, rescinding the discontinuance could not bring them in and hold them bound by the previous decree and proceedings: *Johnson v. Shepard*, 35 Mich. 115. If additional parties plaintiff are made, or there is a substitution of parties plaintiff, no summons issues, because the plaintiff is the moving party and comes into court voluntarily: *Plemmons v. Southern Imp. Co.*, 108 N. O. 614. If the defendants have appeared, and new parties plaintiff have been made by amendment, no new process need issue. It is enough to serve upon them, or their attorneys, copies of the amended pleadings: *Work's Courts and Their Jurisdiction*, sec. 42. But this cannot be done where there has been no appearance: *Powers v. Braly*, 75 Cal. 237. So, in an equitable proceeding, auxiliary to an action at law already pending, and in which the parties have been served, a subpoena may be served on their attorneys: *Abraham v. North German Fire Ins. Co.*, 37 Fed. Rep. 731. So, where defendants, who have not answered an original bill, are called upon by an amended bill simultaneously to answer both, it is not necessary to issue new subpoenas: *Fitzhugh v. McPherson*, 9 Gill & J. 51.

It is held in *Walkenshaw v. Perzel*, 32 How. Pr. 310, that new parties cannot be added to the action without an amendment of the summons, and that the summons cannot be amended as of course, but that the plaintiff can obtain leave to amend the summons under the general prayer contained in his notice of motion, "for such other order or relief as the court shall see fit to grant." When a party asks leave of the court to bring in new parties, he necessarily includes in that request a further request for leave to make such amendment, and to take such steps as shall be requisite to bring into court such new parties. In the order allowing new parties to be brought in, provision may be made for the amendment of the summons and complaint, and the service of the summons upon the new parties, and the service of the amended complaint upon the parties already in, specifying in detail the proper proceedings to pursue; or, it may simply allow the new parties to be brought in, and direct the necessary amendments to be made to the summons and complaint, leaving the plaintiff thereafter to conduct his proceedings regularly at his own peril: *Walkenshaw v. Perzel*, 32 How. Pr. 310. If the plaintiff commences an action, for specific performance, against one defendant, who appears and answers, and the plaintiff, after issue joined, but before the trial, which has been noticed, obtains an order, upon application to the court after notice, adding three other persons as parties defendants, directing the pleadings and proceedings to be amended by adding said three persons as parties defendant, and giving the plaintiff leave to amend his complaint by inserting therein the

necessary allegations to connect said parties defendant with the cause of action, and gets judgment against all of the defendants by default without having served a copy of the order, or a copy of the summons, or complaint, and without further notice to the defendants, the proceedings and judgment should be set aside, with costs. The record of the judgment, in such a case, presents the anomaly of a suit commenced against one defendant, a complaint against the same defendant, and then a final judgment against three persons who are strangers to the pleadings, their names appearing for the first time in the judgment: *Akin v. Albany etc. R. R. Co.*, 14 How. Pr. 337. When new parties are made, both parties should have liberty, if they desire it, to amend and modify their pleadings, so as to exhibit the case as they may respectively desire to present it: *Dabney v. Preston*, 25 Gratt. 818, 843. An order creating a judgment against a man who has never been sued is void. Thus, if, after a judgment of mortgage foreclosure and sale, the name of a person as receiver of a party defendant to the action is ordered to be inserted in the summons and complaint, *lis pendens*, judgment, notice of sale, and all papers and proceedings *nunc pro tunc*, as of the date of the several papers, the order is void and should be reversed. The receiver should have been made a party defendant by serving a supplemental summons upon him. Besides this, the very object of a *lis pendens* might be destroyed if the name of a defendant could be inserted *nunc pro tunc*. If a new party is brought in, a new *lis pendens* should be filed: *Voight v. Schenck*, 54 Hun, 548. An *ex parte* order making a new party a defendant and directing him to appear and answer, where the complaint and summons have not been amended, is erroneous, and will be reversed, especially where the complaint states no cause of action or ground of relief against him: *Penfield v. Wheeler*, 27 Minn. 358. The original defendants are entitled to notice of a motion to add a new party defendant, but it is unnecessary to give notice of such motion to the new party: *Young v. Rollins*, 90 N. C. 134. If new parties plaintiff are added, a failure to actually insert their names in the papers of the case is only a technical omission which is, after verdict, cured by the statute of amendments and jeofails: *Lockwood v. Doane*, 107 Ill. 235; *Aylesworth v. Brown*, 31 Ind. 270. If a plaintiff commences his action against a corporation, and it is served with summons as such, when no such corporation exists, and, after the statute of limitations has fully run, he amends his petition so as to bring in new parties as partners and defendants, the new parties so brought in may successfully rely upon the statute of limitations as a defense: *Leatherman v. Times Co.*, 88 Ky. 291; 21 Am. St. Rep. 342.

SUBSTITUTION—REVIVOR—EXECUTORS AND ADMINISTRATORS.—When a party of record dies pending the action, his representative is not thereby made a party, nor does he become affected by any proceedings in the suit, until he is brought into court and made a party in due form: *Judson v. Love*, 35 Cal. 463, 469; *Ex parte Tinkum*, 54 Cal. 201, 203; but, in some jurisdictions, it is the well-settled practice, in case of the death of a party to an action, to allow the substitution of his legal representatives to be made, upon suggestion of the death, and on an *ex parte* motion showing the appointment and qualification of the executor or administrator of the estate of the deceased party: *Campbell v. West*, 93 Cal. 653, 656; *Judson v. Love*, 35 Cal. 463.

Upon the death of the plaintiff, his executor may be substituted as plaintiff upon an *ex parte* suggestion and proof of death, and no notice thereof to defendants in default is necessary. Such substitution does not require an amendment of the complaint, though all subsequent proceedings should be in the name of the substituted party; and a judgment in favor of the substituted executor is supported by the order of substitution, without any amendment of the complaint, or any service of the amendment upon any of the defendants: *Kittle v. Bellegarde*, 86 Cal. 556; *Taylor v. Western Pac. R. R. Co.*, 45 Cal. 323; *Thorpe v. Starr*, 17 Ill. 199.

Where an action is allowed to be continued against the representatives or successors in interest of a deceased defendant, service of the order of continuance and substitution on the new parties, with a notice to appear, is sufficient to give the court jurisdiction over them; but the service of such order and notice is indispensable to the validity of a judgment, so far as it affects such new parties: *McCreery v. Everding*, 44 Cal. 284; *Judson v. Love*, 35 Cal. 463, 468. When such order and notice are served, it has been held that a summons is unnecessary: *Lyles v. Haskell*, 35 S. C. 391. All that is required for the cause to proceed, where one of several defendants dies pending the action, is to obtain, within the statutory time, the order for a continuance: *Gordon v. Sterling*, 13 How. Pr. 405. When the order is obtained within such time, a supplemental complaint and summons are unnecessary: *Gordon v. Sterling*, 13 How. Pr. 405. If obtained after that time, a supplemental complaint and summons are necessary: *Coon v. Knapp*, 13 How. Pr. 175.

Unless the statute makes some provision for bringing in the representatives of a deceased defendant, resort must be had to a supplemental summons and complaint: *Mackay v. Duryea*, 22 Abb. N. C. 284. So, if a defendant die before service of citation upon him, it is necessary that his administrator be served with a citation and copy of the petition. It is error to render judgment upon service of *scire facias*, only, in such a case: *Lyendecker v. Martin*, 38 Tex. 287. A personal representative, as well as any other necessary party, may be brought before the court by an amended pleading: *Greer v. Powell*, 1 Bush, 489, 496. If the record shows the death of a defendant and the substitution of his executors or administrators, but does not show that the substitution of the latter was made at their instance, or by their authority, or after the proper service of a *scire facias* or rule upon them, the judgment will be reversed: *Hill v. Truby*, 117 Pa. St. 320. Where summons is being served by publication upon nonresident defendants, under a statute requiring a publication once in each of six successive weeks, and the plaintiff dies after four weeks' publication, but the publication is thereafter continued to the termination of the six weeks directed by the order of publication, after which the action is continued, pursuant to the order of the court, in the name of the executrix of the deceased plaintiff, without further publication or appearance on the part of the defendant, there is no effectual service of the summons, and the court acquires no jurisdiction to render a judgment in the action. The publication should have been commenced *de novo* after the substitution, and continued for the requisite six weeks: *Reilly v. Hart*, 130 N. Y. 625; 27 Am. St. Rep. 540. A judgment rendered in the lower court after the death of the original party plaintiff or defendant, can only be regarded on appeal as unauthorized and void, when the transcript fails to show that the legal representative of the deceased party was made a party in the court below: *Clayton v. Preston*, 54 Tex. 418. By the rules of the supreme court of the United States, if either party, in real or personal actions, dies, pending a writ of error, his representatives may voluntarily become parties, or may be compelled to become parties, in the manner prescribed by such rules: *Green v. Watkins*, 6 Wheat. 260.

Moss v. Rose.

[27 OREGON, 595.]

WATERS—IRRIGATING DITCH—COTENANCY.—If persons divert water from a stream, for the purposes of irrigation, by means of a ditch, under an agreement that each shall have his share of the water, they are tenants in common of the ditch and of the right of appropriation, and a continuous use of the water by one of the parties must be presumed to be in maintenance of the rights of all the cotenants.

WATERS—IRRIGATING DITCH—ABANDONMENT.—Though one of the cotenants of an irrigating ditch and of the right of appropriation of water has failed for seven years to put his share of the water diverted to some beneficial use, this does not establish an intention, on his part, to abandon his right, where the evidence shows that, from the time of the appropriation and diversion, he has diligently improved his land, and added materially each year to the area in cultivation, though he has irrigated the tract from other and more convenient sources.

COTENANCY—IRRIGATING DITCH—REPAIRS.—If tenants in common of an irrigating ditch neglect to keep it in repair, one of them has no right to stop up the ditch, though it causes an overflow on his land. All are equally bound to repair, and the injured cotenant may protect himself by completing the necessary repairs and holding his cotenants liable for their share of the expense.

Suit to enjoin the defendant, Rose, from obstructing the flow of water in a ditch constructed across his land. The defendant, in November, 1881, settled on an arid tract of public land. Prior to that time, the plaintiffs, Arthur J. and Alvin S. Moss, had settled on adjoining tracts. The lands were afterward surveyed and patents issued to each of three parties. The lands were in Malheur county, Oregon. The waters of Carter creek run, in a well-defined channel, through the western portion of the defendant's land, in a northerly direction, and those of Sucker creek, entering the defendant's land at the eastern border, run in a northwesterly direction, uniting on Arthur J. Moss' land near its southern boundary. In 1883, the plaintiffs, the defendant, and one Thomas Waite commenced a ditch at the west side of Carter creek, near the south boundary of defendant's land, and jointly constructed it for a distance of about a quarter of a mile. The plaintiffs then built it to their lands, and conducted water therein, which they used continuously, in irrigating their lands, except when prevented from doing so by the defendant. In 1892, the defendant prohibited the plaintiffs from entering upon his premises, or appropriating the water of Carter creek. The defendant removed the headgate, filled the ditch, and obstructed the flow of water to the plaintiffs' premises. Hence this suit. The plaintiffs alleged that the ditch was constructed and owned by the parties as tenants in common, but that the defendant had abandoned his interest. They prayed that the defendant might be restrained from intermeddling with the ditch, or obstructing

the flow of water in it. After denying the material allegations of the complaint, the defendant alleged that he was the prior appropriator of the waters of Carter creek, at a point about one mile above his land; that the plaintiffs' diversion and appropriation had at all times been by his permission, which he had revoked; and that he had filled the ditch because the plaintiffs failed to keep it in repair. The truth of the new matter set up by the answer was put in issue by a reply, and a referee took the evidence, from which the court found that the ditch had been constructed by the parties as tenants in common; that by reason of the defendant's failure to appropriate the water within a reasonable time, he had abandoned his right to its use; and that, by reason of such abandonment, the plaintiffs had become entitled to the exclusive use of the water. The plaintiffs obtained a decree as prayed for, with fifty dollars damages, and the costs and disbursements of the suit. The defendant appealed.

Olmstead & Courtney, for the appellant.

Will R. King, for the respondent.

⁵⁹⁷ MOORE, J. 1. A careful examination of the evidence leads us to the conclusion that the court very properly found that there was an agreement, by the terms of which the plaintiffs, in consideration of their labor and expense in constructing the ditch, should have the right to appropriate one-half the water conducted therein, for the purpose of irrigating their lands; and hence the principal question to be considered is, whether the defendant, by not appropriating the water till 1890, had abandoned all his interests therein. The ditch having been constructed under an agreement between the parties that each should be entitled to appropriate his share of the waters of Carter creek, rendered the parties tenants in common of the ditch and right of appropriation, and the defendant's property rights must ⁵⁹⁸ be governed by the rules of law regulating such: Black's Pomeroy on Water Rights, sec. 63; Freeman on Cotenancy and Partition, sec. 88. Had the plaintiffs abandoned that ditch, and made a subsequent appropriation through another, there might have been just reason for considering the effect of the defendant's delay in applying the water so diverted to some beneficial purpose; but the continued use of the water by the plaintiffs is presumed to be in maintenance of the rights of the defendant, for whom they held it as tenants in common: *Gunter v. Laffan*, 7 Cal. 588. And even if their possession was adverse, it has not continued a sufficient length of time to entitle them to any rights by prescription.

2. Examining the evidence from which an inference of the defendant's intention to abandon the appropriation is to be deduced, we find that in the spring of 1882 he dug a short ditch about one mile above his land, and built a dam in Carter creek, by means of which he turned a portion of the waters of that stream into a slough, from which he constructed a ditch and recaptured the water thus diverted. With this, and water diverted from Sucker creek, which he tapped by another ditch, he was enabled to irrigate that portion of his land lying east of Carter creek, and, after having reduced the same to cultivation, he, in 1890, commenced to improve the tract on the west side of said creek. It is manifest that from the time the defendant appropriated the water, until 1890, he had exercised due and reasonable diligence in reducing his land lying east of Carter creek to cultivation. He had in that time changed an arid sage brush plain of about one hundred acres into a productive farm, and, having succeeded in providing sufficient water for the irrigation of his land lying east of the creek, he immediately turned his attention to the improvement of ~~land~~ that on the west. Having, in 1883, made a diversion of the waters of Carter creek by the ditch in question, the defendant was required to use due and reasonable diligence in appropriating the waters so diverted to some beneficial use. But having made two diversions—one from Sucker and the other from Carter creek—it could not be expected that he must needs abandon the former in order to protect his interest in the latter, nor that he should alternately appropriate the waters of each stream, and make his improvements on both sides of Carter creek, in order to maintain his original rights. Reasonable diligence only was required, and the evidence shows that the defendant faithfully prosecuted the improvement of his lands, adding each year to the area in cultivation. Upon these facts, we cannot say his intention to abandon the use of the waters in Carter creek has been established by that degree of proof required in such cases: Black's Pomeroy on Water Rights, sec. 97; and, as a matter of law, we conclude that the plaintiffs, as tenants in common, held the possession for, and maintained the rights of, the defendant: *Mining Co. v. Tayler*, 100 U. S. 37; *Clymer v. Dawkins*, 3 How. 674.

3. The evidence also shows that the plaintiffs neglected to repair the ditch, in consequence of which it became obstructed, causing an overflow of water on the defendant's land, which washed out quite a gully therein. This, no doubt, precipitated the difficulty, and caused the defendant to take out the headgate and fill the ditch, thereby preventing the water from flowing to

the plaintiff's lands, for which injury the court rendered a judgment against the defendant for fifty dollars as damages. In our view of the case, the defendant was equally liable with the plaintiffs for the expense of keeping the ditch in repair, and the failure of the latter to keep up repairs ⁶⁰⁰ upon it at their own expense did not authorize the defendant to fill it, for which reason the judgment for damages rendered against him will be allowed to remain. The plaintiffs will be allowed to appropriate one-half of the waters diverted, and required to bear one-half of the expense of maintaining the ditch across the defendant's lands, and, for the purpose of performing their part of the work, they must have the right of entry upon the said lands of defendant along the banks of the ditch. And, in case of the default of either party, the other may complete the necessary repairs, and thereupon the party in default shall be liable for one-half the expense thereof.

The decree of the court below will be modified, and one here entered in accordance with this opinion.

COTENANCY—USE OF PROPERTY—REPAIRS.—The entry of one cotenant is the entry of all: *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288. The seisin of one is the seisin of all: *Vaughan v. Bacon*, 15 Me. 455; 33 Am. Dec. 628. And the possession of one cotenant is the possession of all, and inures to the benefit of all: Note to *Vaughan v. Bacon*, 33 Am. Dec. 629; *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281; *Greenhill v. Biggs*, 85 Ky. 155; 7 Am. St. Rep. 579; *Oglesby v. Hollister*, 76 Cal. 136; 9 Am. St. Rep. 177. The possession of one cotenant is always presumed to be in accordance with a common title until some notorious and unequivocal act of exclusion occurs: *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288; *Israel v. Israel*, 30 Md. 120; 96 Am. Dec. 571. Each cotenant has the right to enter upon the lands of the cotenancy: Note to *Harman v. Gartman*, 18 Am. Dec. 659. The general rule is, that a tenant in common cannot make his cotenant liable for repairs on the common property, even though necessary, without a previous request and refusal to join in making them: Note to *Louvalle v. Menard*, 41 Am. Dec. 165; but there are cases holding that a cotenant may recover from his fellow-tenants a proportion of the cost of repairs made by him: See monographic note to *Robinson v. McDonald*, 62 Am. Dec. 483, on repairs by cotenant. Notwithstanding this variance, if an action or bill for an accounting for rents and profits, or an action for partition, is brought against a cotenant, he is entitled to a proper allowance for necessary repairs: Note to *Robinson v. McDonald*, 62 Am. Dec. 483; and monographic note to *Flack v. Gosnell*, 35 Am. St. Rep. 422, on the lien of one cotenant on the moiety of another; and the writ de reparatione was a process to compel repairs to be made under order of court: Note to *Robinson v. McDonald*, 62 Am. Dec. 483.

WATERS.—ABANDONMENT of a water right is a matter of intention, and, to constitute such abandonment, there must be an intent to abandon: Note to *Wimer v. Simmons*, ante, p. 685; and, according to the general principles of the law of abandonment, there must be the concurrence of the intention to abandon, and the actual relinquishment of the property, so that it may be appropriated by the next comer: Note to *Wyman v. Hurlburt*, 40 Am. Dec. 464, on abandonment in general.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

**GRAYBILL v. PENN TOWNSHIP MUTUAL FIRE INSUR-
ANCE ASSOCIATION.**

[170 PENNSYLVANIA, STATE, 75.]

INSURANCE—PAROL EVIDENCE OF THE MEANING OF A WORD.—If insurance is effected on a building and its contents, parol evidence is admissible, not only to show what these contents were, but further that it was understood between the parties that such contents should continue to be covered by the insurance, though they had been removed to another building, and the building in which they were when an insurance was effected was not injured by the fire. Hence, under a policy insuring a smokehouse and its contents, it is not error to admit evidence that the insurer was shown the house, and was told that insurance on the meats to be smoked therein was desired, and that such meats, when smoked, would be stored, and that, with full knowledge of the facts, the insurer selected the word "contents" as a proper and sufficiently descriptive word to cover the smoked meats, whether in the smokehouse undergoing process of smoking, or in the storeroom after its completion.

Eugene G. Smith and A. F. Hostetter, for the appellant.

J. Hay Brown and W. U. Hensel, for the appellee.

⁸¹ WILLIAMS, J. This case turns upon the meaning of the word "contents," as used in the policy of insurance sued on. A ground barn and a butcher shop were insured as one building for the sum of four hundred dollars, and the contents were insured for four hundred dollars more. A smokehouse was insured for ⁸² five dollars, and its contents for five hundred dollars. The barn and butcher shop were burned with their contents. The smokehouse was not burned, but its contents, which had been removed to a storageroom in one end of the butcher shop, were wholly consumed. The question presented on this appeal is,

whether the smoked meats in the storageroom, which were taken there as fast as they were cured in the smokehouse, were contents of the smokehouse, within the meaning of the policy, and were to be paid for by the company as part of the loss for which it was liable. Words must be understood in the sense in which they are commonly used in the business to which the contract in which they are found relates. This contract was to insure the buildings, machinery, and stock of a butcher. The president of the company proposing to insure was on the ground. The buildings and the property were examined by him. The evidence shows that in the barn and butcher shops there were a steam-engine and boiler, with conveniences for handling dressed cattle, machinery for chopping or grinding meat, and for making bologna and other sausages. These, as the plaintiff alleges, constitute the contents of the barn and butcher shop that were insured for four hundred dollars. The smokehouse and storageroom were also pointed out to him, and it was explained to him, as the plaintiff testifies, that the smokehouse could hold but a small amount of meat at one time while the process of smoking was going on, but the hams, sausage, bacon, or other meat was removed from the smokehouse when cured, and stored in the storageroom, and that what was wanted was insurance on the smoked goods. The plaintiff says that the president stated that the smoked meat would be properly insured as contents of the smokehouse, and these words were written in the application and policy with that understanding, viz., that they would include and cover the smoked meats taken out of the smokehouse for storage in the room used for that purpose. The learned judge of the court below left this evidence to the jury for their consideration, telling them if they were satisfied by it the word "contents," used in connection with the smokehouse, was understood and intended by both insurer and insured to cover the smoked meats in store, whether actually in the smokehouse or not, the plaintiff would be entitled to recover to the extent of five ⁸³ hundred dollars for his loss on these goods. This is assigned as error, and the contention of the appellant is, that it permitted an alteration to be made in a written instrument upon the uncorroborated testimony of the plaintiff. But the word "contents" is not a certain and definite description of any particular class of goods. Its meaning must be ascertained by considering the context, the nature and methods of the business for which the building whose contents are to be insured is to be used, and the understanding and intentions of the parties as expressed at the time the insurance was con-

tracted for. Thus we learn from the evidence in this case that the contents of the butcher shop were not made up of slaughtered cattle, but of a steam-engine and various pieces of machinery; while the contents of the smokehouse included hams, bacon, bologna sausages, and other forms of smoked meat. This is, in the absence of a detailed description of the articles in the body of the policy, the only way in which the character and value of the contents of a building can be shown. But the defendant alleges that, as the building was not burned, its contents could not be. This is a non sequitur. The contents might be destroyed while outside the building, and, when that happens, the question of the plaintiff's right to recover must depend on whether the purpose of the removal was such as to detach the goods permanently from the building and create a new or an increased hazard not contemplated when the contract for insurance was made. The investigation of this question is not an attempt to reform the contract, but to determine its meaning and extent. The rule in equity governing the reformation of contracts is not applicable, therefore, but the jury is at liberty to determine the question presented to them in this case by the preponderance of the evidence. The evidence showing the capacity of the smokehouse, the necessity for the removal of the smoked meat as soon as it was properly cured to some place near by for storage, while a fresh supply of meat for smoking was put in its place, the location of the storageroom and quantity of smoked meats kept in store ready for sale, was relevant to the inquiry in this case, and was properly admitted. So was the evidence tending to show that the attention of the insurer was called to the manner in which the smokehouse was used and the smoked meats stored, that he was informed that ⁸⁴ the smoked meats were what were to be insured in connection with the smokehouse; and that, with full knowledge of all the facts, he selected the word "contents" as a proper and sufficiently descriptive word to cover the smoked meats, whether in the smokehouse undergoing the process of smoking, or in the storeroom after its completion. The facts and circumstances thus brought to the attention of the court and jury were helps to a correct exposition of the words the parties had employed. They tended to corroborate the plaintiff's version of the contract, and to sustain his claim. They were persuasive in their character, and, as we infer from their verdict, satisfied the jury that the words "contents of the smokehouse" were understood and intended by both parties to cover the smoked meats passing through

the smokehouse to the room near by, in which they were stored till needed for the supply of customers.

We see no error in the rulings complained of, and the judgment is affirmed.

PAROL EVIDENCE TO EXPLAIN WRITTEN INSTRUMENTS.—Parol evidence is admissible to explain what is doubtful in a ballot: *Rutledge v. Crawford*, 91 Cal. 526; 25 Am. St. Rep. 212, and note; or to explain a latent ambiguity in a deed: *Frost v. Erath Cattle Co.*, 81 Tex. 505; 26 Am. St. Rep. 831, and note; or to explain the meaning of abbreviations in a contract: *Berry v. Kowalsky*, 95 Cal. 134; 29 Am. St. Rep. 101, and especially note. Oral evidence may be admitted for the purpose of applying the terms of the writing to the subject matter, and removing any ambiguity arising from such application: *Stoops v. Smith*, 100 Mass. 63; 97 Am. Dec. 76, and note; *Pursley v. Hayes*, 22 Iowa, 11; 92 Am. Dec. 350; *Sweat v. Shumway*, 102 Mass. 365; 3 Am. Rep. 471. See, also, the extended note to *Morton v. Jackson*, 40 Am. Dec. 109.

FINK v. SMITH.

[170 PENNSYLVANIA STATE, 124.]

CONTRACTS MADE UNDER MISTAKE OF FACT.—Where certain facts are assumed by both parties as the basis of a contract, and it subsequently appears such facts did not exist, the contract is inoperative.

CONSIDERATION, WANT OF.—A contract made by the owner to obtain possession of his goods, when they are unlawfully withheld from him, is without consideration and void.

COMPROMISE, WHEN WILL NOT BE ENFORCED.—An agreement by the owner of personal property wrongfully withheld from him by another, on the latter's surrendering possession thereof, that it shall be returned to him, if his vendor, on a trial for stealing it, shall not be convicted, cannot be supported as a compromise, and is therefore void.

H. H. McClune and George B. Cole, for the appellant.

James B. Ziegler, for the appellee.

123 DEAN, J. Smith, the defendant, at a sheriff's sale of the personal property of one Sarah Hyde, wife of George Hyde, purchased a mare; then, as a mere act of kindness toward Mrs. Hyde, he left the animal temporarily with her; some months afterward, George Hyde, the husband, sold the mare to Fink, the plaintiff, who took her into his possession; Smith, the owner, hearing of this went to Fink and demanded his property, but he refused to surrender possession; then Smith informed Gallatin, the sheriff, who had sold her to him, of the wrong, and threatened to replevy her; Gallatin replied that was not necessary, as he would get her

for him; Gallatin went to Fink, and obtained a promise from him to restore the mare to Smith without a replevin; then Smith again went to Fink, and the mare was delivered to him, on the condition that, if, on an indictment for larceny of the mare, then pending against George Hyde, there should be an acquittal, the mare should be returned, but, if Hyde were convicted, Smith was to keep her. Hyde was acquitted of larceny. Thereupon, Fink replevied the mare. When the case came to trial, the facts turned out as we have stated them from the admissions of the parties and the findings of the jury. The verdict was for Fink, plaintiff, in damages to the value of the mare. Hence this appeal by Smith, defendant.

The controlling assignment of error, and which, in substance, embraces all the error alleged, is raised by the following excerpt from the charge of the learned judge of the court below: "The only question remaining in this case is, whether the mare was, under this agreement, to be returned to Fink, if Hyde was ¹²⁷ acquitted of the charge in court of the larceny of the mare. If so, then we instruct you that there was sufficient consideration for that agreement at the time of the lawsuit in order to recover her, and at the time this mare was involved in the threatened lawsuit; and the only way that he could get her without a lawsuit was by making this agreement that it is alleged on the part of plaintiff was made between Fink and Smith. If you believe such an agreement was made, then your verdict should be for the plaintiff for the value of the mare, with interest from that time."

Was this correct instruction as to the law applicable to the evidence? There was no dispute as to the ownership of the property; the mare, it was conceded, belonged to Smith; and, although he testified no such conditional bargain was made, it was just as positively testified to, on the other side, that it was made, and the jury have found the fact against him. So, we have the unquestioned owner of the mare bargaining with one in wrongful possession for her surrender; the possession thereafter to be determined by the verdict in a criminal prosecution, then pending. Was his possession, thus obtained, wrongful, as against Fink, when the event of the prosecution was the acquittal of Hyde? That depends on the validity of the contract between them.

1. The contract was void, because based on a fact which did not exist, though both parties assumed it to be a fact. Fink purchased from George Hyde; both assumed that Hyde's title would necessarily be determined by his acquittal or conviction of larceny; but the event of the prosecution in no wise determined that;

it determined only that the evidence did not show, beyond a reasonable doubt, a felonious intent; what the weight of it showed, we do not know; but the admitted facts here, that the mare is Smith's, and that Hyde sold her, also show conclusively that Hyde was guilty of either larceny or trespass. So their assumption, that the criminal prosecution would determine Hyde's title, and necessarily theirs, was a mutual mistake of fact. "Where certain facts assumed by both parties are the basis of a contract, and it subsequently appears such facts do not exist, the contract is inoperative": *Horbach v. Gray*, 8 Watts, 497; *Miles v. Stevens*, 3 Pa. St. 21; 45 Am. Dec. 621; *Willings v. Peters*, 7 Pa. St. 287; *Frevall v. Fitch*, 5 Whart. 325; 34 Am. Dec. 558.

¹²⁸ 2. There was no consideration to support Smith's promise. A promise made by the owner to obtain possession of his goods, which at the time are wrongfully withheld from him, is without consideration: *Chitty on Contracts*, 51; *Addison on Contracts*, 13. This principle is conceded by the learned judge of the court below, and the undoubted wrongful possession by Fink of Smith's property is also conceded. But he assumes, there is no evidence that Fink knew this at the time he delivered it to Smith, and therefore the contract should be treated as a compromise of doubtful litigation, which is a good consideration to support a contract. But the error in this view is, that Fink's wrongful possession did not depend on what he knew, but on the fact. Was it Smith's property? Had he demanded it from him who wrongfully detained it? If these were the facts, and they are not denied, then there was no consideration for Smith's promise, for no benefit passed to Smith, and Fink sustained no loss by the contract; to hold that the abandonment of a wholly wrongful detention of another's property can form the basis of a compromise contract with the owner is direct encouragement to the commission of wrong for profit, and for this very reason the law holds the contract to be without consideration. If Fink had been indicted for the larceny of the mare, his knowledge of the ownership would have been material in determining his guilt, but it is of no moment in determining the fact of ownership.

3. While we think it is of doubtful public policy to enforce a contract, where the right to property is made to turn on a verdict in a criminal prosecution, in which both parties to the contract are witnesses, we do not decide the case on that point.

We are of opinion, however, the contract was based on a mutual mistake of a fact, which had no existence, and, further, was without consideration. Therefore, the judgment is reversed.

MISTAKE—WHEN AVOIDS CONTRACT.—A contract induced by a mutual mistake in respect to the subject matter is inoperative and void: *Bedell v. Wilder*, 65 Vt. 406; 36 Am. St. Rep. 871, and note. See, also, the extended note to *Miles v. Stevens*, 45 Am. Dec. 631.

A CONTRACT THE CONSIDERATION OF WHICH IS A COMPROMISE OF A FELONY is based upon an illegal consideration, and is therefore void: *Morrill v. Nightingale*, 93 Cal. 452; 27 Am. St. Rep. 207, and note.

FRAM V. NATIONAL FIRE INSURANCE COMPANY.

[170 PENNSYLVANIA STATE, 151.]

INSURANCE.—A CONDITION IN A POLICY OF INSURANCE AGAINST THE USE OR KEEPING OF GASOLINE on the insured premises, is not broken by the use of gasoline to an extent necessary to carry on the business for which the insurer knew that the property insured was used, and where both parties must have known or where that the business insured must be discontinued or gasoline used therein.

IN CONSIDERING THE CONDITIONS AND PROHIBITIONS IN A POLICY OF INSURANCE, the parties must be presumed to have intended, the one to insure, and the other to obtain insurance on, the subject matter of insurance as it necessarily was at the time, and must continue to be during the life of the policy.

TO JUSTIFY THE USE OF GASOLINE ON INSURED PREMISES, on the ground that such use was necessary to continue the business which the insurer knew to be the one carried on by the assured, the necessity need not be absolute, nor need it be proved that the gasoline was of such vital importance to the business that it could not be ignored. It is sufficient that the gasoline was in ordinary use by the trade for the attainment of the results for which it was employed by the assured.

John W. Appel, D. C. Herr, and C. H. Bergner, for the appellant.

J. Hay Brown and W. U. Hensel, for the appellees.

¹⁶⁰ **DEAN, J.** On January 21, 1893, plaintiffs were carrying on the business of gold, silver, and nickel plating in a three story brick building in Lancaster city; at that date, they took from defendant a policy of insurance against fire, in the sum of fifteen hundred dollars, for the term of one year, on all their tools, machinery, gas fixtures, and waterpipes in the building. One of the printed conditions of the policy read thus:

"This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void, if (any usage or custom of trade or manufacture to the contrary notwithstanding) ¹⁶¹ there be kept, used, or allowed, on the above-described premises, benzine, benzole, dynamite, ether, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives."

The property insured was destroyed by fire on the night of September 7, 1893; the loss largely exceeded the amount insured. The plaintiffs used gasoline in their plating process, and also for the cleaning of tools and molds; it was not, however, kept or stored in the building where the property was insured, but in another building about fifteen feet distant; the quantity kept there seldom exceeded one barrel; when needed in the factory, it was drawn from the barrel through a spigot, and carried to the third story of the factory and emptied into an open kettle, which had a capacity of three to four gallons; from the kettle it was taken as needed for use in cleansing tools and molds. On the night of the fire, there was no gasoline in the kettle, all put in that day having been used. After the fire, the barrel of gasoline in the other building was found undisturbed; so the fire did not originate from the gasoline in either the kettle in the factory or barrel in the outbuilding.

The insurance company refused to pay the loss, alleging the policy was void, because of the violation of the condition by the insured in using, and allowing to be used, gasoline in the building where the machinery was insured. Thereupon plaintiffs brought suit. At the trial, there was practically no dispute as to the facts as we have stated them; the learned judge of the court below, however, submitted the evidence to the jury to find: 1. Was the use of gasoline necessary in carrying on the business of silver plating and cleaning tools? 2. Was gasoline so used when the policy was issued, and was this use continued up to the date of the fire? 3. Was it properly and carefully used? If they answered these three interrogatories in the affirmative, then they were directed to find a verdict for plaintiff in the amount of the policy. There was a verdict for plaintiff, and, judgment having been entered thereon, the defendant brings this appeal, preferring thirteen assignments of error, which it is conceded may be considered as raising really but three questions:

1. What interpretation is to be given the words, "This entire policy . . . shall be void, if (any usage or custom of trade or ¹⁶² manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises . . . gasoline?"

The premises described is the three story brick building used as a factory; the building in which the barrel of gasoline was stored was not insured, nor was it within any prohibition of the policy.

As the finding of the jury was against defendant on the facts,

if there were no error in the admission or rejection of evidence, then, as appellee's counsel argues, "the case presents a pure question of the construction of a contract."

We assume that to constitute a contract there must be the assent of two minds to the same thing in the same sense. When defendant issued, and plaintiffs accepted, the policy, on what sort of property did plaintiffs want to be indemnified, and what did defendant know it was insuring? Defendant viewed the machinery and tools in the building then being operated in the work of gold, silver, and nickel plating, and, by the express terms of its policy, its indemnity is to the "Lancaster Silver Plate Company." Bringing the parties together at the factory, for the purpose of contracting for insurance on the machinery and tools in the building to be used in gold, silver, and nickel plating, what must we assume defendant knew? Certainly, that it knew what was necessary to carrying on the business. We cannot assume that a party, honestly accepting another's money as a consideration for the faithful performance of a very important contract, was wholly ignorant of the subject of the contract. Plaintiffs were engaged in gold, silver, and nickel plating; in carrying on this business, it is well known, certain materials, chemicals, and combinations of chemicals are necessary, and without them it could not be carried on; the jury have found as a fact, from the evidence, that the small quantity of gasoline used was necessary to the operation of these works, and that it was in use at the date of the policy; if necessary, then the cessation of its use meant the stoppage of the business, or so crippling it that it must prove unprofitable. Is it a reasonable interpretation of the contract to suppose either party intended that result? To conclude they did not is only to assume the insured were not idiots and the insurers were not cheats.

¹⁶⁸ The general rule, deducible from the text-books and adjudicated cases, as to such prohibitions, is, that it is the intent of the parties to insure the subject of insurance as it necessarily is and must continue to be during the life of the policy. And, as is said in *Stacey v. Franklin Fire Ins. Co.*, 2 Watts & S. 506: "Policies are to be construed largely according to the intention of the parties, and for the indemnity of the assured and the advancement of trade. Facts and circumstances dehors the instrument may be proved, in order to discover the intention of the parties." So, where the printed portions of a policy prohibited the use of extra hazardous material, necessarily used in operating the machinery, or business insured, and the written or inserted description of the subject of insurance did not prohibit them, it was held the use

of the hazardous material did not avoid the policy: *Franklin Fire Ins. Co. v. Brock*, 57 Pa. St. 74; *Hayward v. Northwestern Ins. Co.*, 19 Abb. Pr. 116; *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15; 57 Am. Rep. 647; *Citizens' Ins. Co. v. McLaughlin*, 52 Pa. St. 485.

In the case last cited, the insurance was upon a leather factory; the printed condition prohibited the use of benzole; plaintiff proved the use of this material was essential to successfully operate his factory; the benzole, as the gasoline in this case, was kept in a shed some distance from the building insured, and was carried from the shed to the main building in a bucket when used; a fire originated from the benzole in the bucket after it had been carried into the main building, and destroyed the property covered by the policy. This court, by Woodward, C. J., said: "But did they mean to exclude it from the factory as an element or agent in the conduct of the business? To assume that they did, in the absence of language to that effect, would be to assume that they expected the business to stop or to be carried on out of the usual mode." That case is a stronger one against the insurers than the one before us, only because the essential fact is an obvious inference from the contract itself. That policy expressly granted to the insured the privilege of keeping five barrels of benzole in the shed, but expressly stipulated the shed was not insured. The inference necessarily was, the company knew the benzole kept in the shed was for use in the factory; then, following this up with proof that benzole was ordinarily used in the manufacture of leather, plaintiff claimed the manifest intent of the ¹⁶⁴ contract was, that it should not be avoided by such use of benzole. In the case before us, nothing is said about the storage of gasoline in the outbuilding, but, on the evidence dehors the contract, it was submitted to the jury to find whether the use of gasoline was necessary to the business of silver plating, and whether it was in use at the date of the policy; and they found both facts affirmatively; then follows the only warrantable inference, that the insurers knew when they delivered their policy the acceptance of it was not to be as disastrous to the insured as the destruction of their property by fire; because on the fact found, that the use of gasoline was necessary to the successful carrying on of the business, and, if the policy prohibited such use, then the insured would have offered him the alternative of stopping business, or taking the risk of fire. No one believes an insurance company would tender such a contract or a sane man accept it; such a choice was not intended by either party to the policy. It would be just as probable a supposition that the company would have tendered to a silver plate

manufacturer a policy containing a stipulation avoiding it, if the assured kept or used silver plate upon the premises.

This disposes of the first five assignments of error, which complain of the interpretation of the contract by the court below.

2. The sixth and seventh assignments are to the admission of testimony offered by plaintiff to prove that the use of a small quantity of gasoline was necessary in the business of silver plating; that at the date of the policy, and for several years before, it had been so used by plaintiffs, and that such use was continued without change down to the time of the fire. The appellant argues that this was error, because the insurance was not of machinery and tools to be used in any particular business; was simply an insurance upon the property in a particular building, and as part of the contract, the use of an extrahazardous material was prohibited. As the objection assumed defendant's interpretation of the contract to be the true one, which it was not, as we have already noticed, the objection was properly overruled. The written contract itself shows the defendant insured to a silver plating company its boilers, machinery, and tools in its manufactory. It must be assumed the insurers knew for what purpose the machinery ¹⁶⁵ was then being used, and for what purpose it would be used; just as would be assumed, if they had taken a policy on the machinery in a flourmill, they knew it was to be used in the manufacture of flour.

The eighth and ninth assignments of error are to the rejection of a part of the testimony of John H. Carrow, a witness examined as an expert by defendant. It was proposed to ask the witness what effect gasoline would have when used in cleansing in the process of silver plating; the witness had already stated that he had never seen gasoline so used; that for the same purposes he had always used, and had always seen used, concentrated lye; that he knew gasoline was a product of petroleum. Clearly, the witness had not the knowledge that warranted him in testifying as an expert to the effect of gasoline, and there was no error in sustaining the objection. He did testify that the use of gasoline, as proven by plaintiff, was not necessary in silver plating, and that he had never heard of it before; this was the most his knowledge warranted.

3. The defendant's tenth assignment is based on the refusal of the court to instruct the jury that it was incumbent on the plaintiffs to show that the use of gasoline was of such vital importance to the conduct of their business that it could not be ignored, and

if any nonprohibited article could have been used in place of gasoline, it was the duty of plaintiffs to use such article.

We do not think such a heavy burden as this was imposed on plaintiff; in effect, the point asked the court to say the necessity must have been absolute. This is not the rule laid down in any of this class of cases. In *Hall v. Insurance Co.*, 58 N. Y. 292, 17 Am. Rep. 255, the policy was on a photographer's establishment; it was held to cover property destroyed, which was necessarily and ordinarily used in that business, although, by the printed conditions of the policy, the use of some of the articles was prohibited. There are but few manufactured articles which could not be produced by more than one process; that one, however, may be properly deemed necessary which is in ordinary use by the trade for the attainment of the result. To this point tended plaintiff's evidence, and the instruction to the jury, that they must find the use of gasoline was necessary, was as favorable to defendant as the law required; the court was ¹⁰⁶ not bound to instruct that the necessity must be an absolute one; that is, if silver plating could be done by any other process, plaintiffs were bound to adopt it, or their policy was void.

As to the remarks of the court to counsel when motion for compulsory nonsuit was refused, even if an expression of opinion on the evidence, it does not follow the jury heard them, and it certainly will not be presumed their verdict was controlled by what was not addressed to the jury. If counsel for defendant feared their cause would be prejudiced by what the judge said to them and not to the jury, they should have asked him to instruct the jury to disregard it.

There is nothing in any of the assignments requiring further notice. We are convinced that the case was tried without substantial error, and that the judgment is just; it is affirmed.

THE PRINCIPAL CASE was followed in *Lancaster Silver Plate Co. v. Manchester Fire Assur. Co.*, 170 Pa. St. 166. The plaintiffs in that case, as partners, carried on the business of gold, silver, and nickel plating, and insured their property, used in such business, against loss by fire. In the policy the property was described as being the stock of the plaintiffs, "finished and in process of finishing, their own, or sold but not removed, including all acids, solutions, and materials for the same in their trade as gold, silver, and nickel platers, and manufacturers of silver-plated and metal goods, all contained in the three story brick tin roof building, occupied by the assured, etc."

In the policy was a provision as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, gasoline."

It was conceded that the insured kept a barrel of gasoline in a small

outbuilding about fifteen feet from the factory, on an adjacent lot; that such building was not insured; and that gasoline in small quantities was used in the process of plating, principally for cleansing tools and molds, and, when desired to be used, was carried and put in a kettle holding about three or four gallons, and placed in the third story of the factory. At the time when the loss of the property insured occurred by fire, there was no gasoline in this kettle, nor was the barrel in the outbuilding disturbed; and it was clear that the fire resulting in the loss was not attributable to the gasoline. It was also indisputable that gasoline in the quantity mentioned had been used in the factory almost daily for years before the policy was issued, and that such usage continued without change until the fire.

The defense being interposed that the policy had become void by breach of the condition against the use of gasoline, the court held the case to be controlled by the decision in the principal case, and that it was not necessary to repeat the interpretation put upon a similar provision in the principal case. The court added: "As we held in the case against the National Fire Insurance Company, already noticed, if the fact were that the use was a necessary one in conducting the business, then it must be presumed the intent of the parties was to insure the subject of the contract as it then was, and as it would continue to be during the life of the policy, notwithstanding the printed condition; and, further, that the fact of the necessity of the use, for the purpose of establishing the intent of the contracting parties, could be proven by evidence dehors the instrument. It follows from the opinion and judgment in that case, all the assignments of error in the one before us must be overruled, and the judgment affirmed."

The same question involved in the principal case was also presented, and was determined in harmony with the principal case, in *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604, which will be reported in 51 *American State Reports*.

INSURANCE—CONSTRUCTION OF POLICY.—Policies of fire insurance must be construed with reference to the nature of the property and the manner in which it is usually kept: *Extended note to Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 390.

INSURANCE—CONSTRUCTION OF CONDITION AGAINST KEEPING GASOLINE ON PREMISES.—A stipulation in a policy that "if the assured shall keep or use . . . petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid, or chemical oils, without written permission in this policy, then, and in every other case, this policy is void, and all insurance thereunder shall immediately cease and determine," is a part of the contract of insurance, and a reasonable restriction against the use of dangerous and combustible materials; and the use by the assured of naphtha or benzine on the premises avoids the policy and forfeits the insurance, unless such use was one incidental to the business, adopted from necessity or custom, and recognized by the insurer: *Wheeler v. Traders' Ins. Co.*, 62 N. H. 450; 13 Am. St. Rep. 582, and note with the cases collected. A policy of insurance prohibiting the premises from use for carrying on a business denominated as hazardous or extrahazardous, or for storing therein articles so denominated, is not avoided by the use of such premises as a retail grocery store, where gasoline and coal oil are kept for sale, in the absence of a schedule of what should be denominated a hazardous business or hazardous articles attached to or included in the policy, or of proof that it was not customary to so keep gasoline and coal oil, or that the insured knew they were prohibited under the terms of the policy: *Renshaw v. Missouri etc. Ins. Co.*, 103 Mo. 595; 23 Am. St. Rep. 904.

GILFILLLEN'S ESTATE.

[170 PENNSYLVANIA STATE, 185.]

GUARDIAN, PERSON ACTING AS WITHOUT AUTHORITY, RIGHT OF TO CREDITS.—If a person coming into possession of the funds of a minor makes such use of them as he ought to have made had he been a regularly appointed guardian, and such as any orphans' court having jurisdiction would have authorized him to make, he will, on subsequently being sued, or otherwise called to account, by such minor, be allowed credits for all sums so expended.

GIFTS, EVIDENCE TO DISPROVE.—The fact that the grandfather of a minor having funds of the latter in his hands, and making expenditures for her benefit, keeps an account in which all such expenditures are charged against her, is sufficient to rebut any presumption, or loose declarations, tending to show that such expenditures were made by way of gifts.

Charles H. Smiley, for the appellant.

James M. Sharon and Charles A. Barnett, for the appellee.

189 GREEN, J. In this proceeding it is attempted, by means of a rule to show cause, to obtain a decree for the payment of money against the estate of Lewis Gilfillen, deceased. If the decedent owed money to the appellant, the form of the proceeding would not be objectionable. But if no money is owing by the decedent to the appellant, neither law nor equity could tolerate the decree sought for. The basis of the contention is, that the decedent, being the administrator of the estate of the appellant's father, had in his hands, at the settlement of his account as administrator, a sum of money belonging to the appellant, who was then an infant, and that this money, or any part of it, was never paid by the decedent to the appellant. The amount of the fund was one thousand and ninety-four dollars and thirty-six cents. If the decedent had been the guardian of the appellant, he would have been liable to file an account of his trust, and, upon the settlement of the account, the question would have been, whether he had paid out the money in such a way as the law would recognize as proper, and for the benefit and advantage of the ward. If he had, he certainly would have been entitled to credit for such payments, and, in that event, if the payments exhausted the fund in the guardian's hands, no recovery could be had for the moneys so paid. That is what would have been the result if he had been regularly appointed as guardian, had accepted the trust, and had fully executed it. Is any different rule to be applied to the case, if he was not so appointed, and yet had acted as such in point of fact, and had faithfully performed his trust? If so, the ward obtains a right to have money which she could not have had, if the decedent had held a regular appointment. Such a result is not

reasonable, and we can see no just cause for reaching it. Now, in point of fact, the payments made by the decedent during the minority of the appellant amounted to considerably more than the whole sum of the money which came into his hands, with lawful interest added, and they were of the most humane and beneficent character, such as ought to have been made if he had been regularly appointed as guardian, and such as any ¹⁹⁰ orphans' court having jurisdiction would have authorized him to make, and would, in all probability, have required him to make, if he had not done so voluntarily. The appellant was born a deaf mute. She could neither speak nor hear. Her condition was most pitiable, and her mother was most anxious that she should receive such education as is given to persons so afflicted. Her grandfather, the decedent, took pity upon her, and yielding to the earnest solicitations of the appellant's mother, and to his own instincts of natural affection, he did have her educated with such excellent results that she was enabled to overcome the frightful afflictions of her birth, and is now able to speak and practically to hear, and her life, which otherwise would have been one of dumb misery and sorrow, is made tolerable and happy. The question is, What was the decedent's position with reference to the appellant, and to what credits would he be entitled upon the adjudication of an account?

In the case of *Van Epps v. Van Deusen*, 4 Paige, 64, 25 Am. Dec. 516, the father of the ward, without any appointment as guardian, received a sum of money belonging to his infant daughter, and also appropriated the services of a female slave belonging to her. After attaining her majority, upon a bill filed against her father's executor, the estate was held liable to account, upon the theory that he could be held accountable as a guardian legally appointed. The chancellor delivering the opinion said: "Although, as the mere guardian by nature, he had no right to receive the money due on the bond, or to receive the services of the slave, yet this court will hold him liable to the same extent as if he had been the legally constituted guardian, so far as he has had the benefit of the infant's property. A mere stranger or wrongdoer who takes possession of the property of an infant, and receives the rents and profits thereof, may, in equity, be considered as the guardian, and may be compelled to account as such: 1 West, 265; *Bennet v. Whitehead*, 2 P. Wms. 645; *Newberg v. Bickerstoff*, 1 Vern. 295; *Parmenter v. Phillips*, 2 Car. Law Rep. 412." See, also, the copious notes to this case as reported in 3 N. Y. Ch. Rep., lawyers' ed., 344. See, also, the case of *Davis v. Crandall*,

101 N. Y. 311, in which the same doctrine was recognized and enforced.

In *Davis v. Harkness*, 1 Gilm. 173, 41 Am. Dec. 184, ¹⁹¹ Caton, J., says: "Authorities are not wanting to show that Harris received this money as guardian of these infants, and, as such, they may claim an account for it, if they choose. In *Newberg v. Bickerstoff*, 1 Vern. 296, the lord keeper observed that Littleton says, if a man obtrudes himself upon an infant, he shall receive the profits but as a guardian, and the infant shall have an account. . . . Upon principle too, as well as authority, should the infant be entitled to an account against him as guardian. . . . If he receives the money of the infant, and uses it, he is estopped from denying that he received it as guardian."

In the case of *Cary v. Bertie*, 2 Vern. 343, the lord chancellor said: "If a stranger enters and receives the profits of an infant, he shall, in the consideration of this court, be looked upon as a trustee for the infant and the like."

In *Hipp v. Babin*, 19 How. 271, it was said in the opinion: "There are precedents in which the right of an infant to treat a person who enters upon his estate, with notice of his title, as a guardian or bailiff, and to exact an account in equity for the profits, for the whole period of his occupancy, is recognized: *Blomfield v. Eyre*, 8 Beav. 250; *Van Epps v. Van Deusen*, 4 Paige, 64; 25 Am. Dec. 516."

We are not aware of any decisions of this court which are in conflict with the foregoing authorities, or with the principles upon which they were determined. The proposition that, because an administrator or executor cannot be appointed guardian of a minor interested in the estate of which he has charge, he, therefore, cannot be treated as a guardian in fact, is altogether untenable. Treating an administrator who has acted as a guardian of such a minor as if he were actually appointed as such means only holding him to such liability as he would have incurred if he had been really appointed. This judicial treatment of such a person is the most favorable to the interests of the ward, but it certainly does not follow that if such a person makes payments out of the funds which belong to the ward, for the best interests of the ward, such as any court having jurisdiction would allow or direct him to make, he is to be denied all credit for such payments.

Even executors *de son tort* are entitled to have credit for valid debts of the decedent actually paid by them out of assets ¹⁹² upon which they have intruded: *Saam v. Saam*, 4 Watts, 432;

Roumfort v. McAlarney, 82 Pa. St. 193. In the latter case we said, Gordon, J: "If we assume that she is to be regarded as an *executrix de son tort* of her husband's estate; that she took possession of the property in question, sold it to the defendant, received the money and applied it to the debts of the decedent, in such case it might be that we should treat the title as having vested in the defendant; for, under such circumstances, the property would have passed into a quasi administration, which it would be inequitable to disturb."

In 7 *American and English Encyclopedia of Law*, 189, it is said: "All proper and lawful acts done by an *executor de son tort* are binding upon the estate, if the rightful executor or administrator would have been bound to do likewise in due course of administration."

It is contended by the appellant that the money expended by the decedent for her special instruction was a gift, for which he had no intention to charge her estate, and therefore he can have no credit for such payments. Evidence was given of some loose declarations of the decedent indicative of such a purpose, but other and much more satisfactory evidence was given showing that he did not have such an intent. Amongst other things, he kept a precise account on his books showing the date and amount of every such payment made by him, and also the amount he held in his hands of money belonging to her. The heading of this account on his books shows the intent with which he regarded his own position with reference to this subject. It is as follows:

Lewis Gilfillen. Dr.

"1876 January 1st. The amount due Jennie Gilfillen and subject to Guardianship from Lewis Gilfillen, Administrator of James Gilfillen, deceased, the amount is Ten hundred and ninety-four dollars and thirty-six cents.

Paid for Jennie Gilfillen. .

"1876 Nov. 1st. Paid Samuel Stites for Medical attendance \$21.00; Paid Miss Patterson for Milk \$11.81; Paid Miss Plympton for teaching 11½ months \$383.30."

And then follow a number of similar entries of payments for teaching and schooling at Philadelphia to May 28, 1892; the aggregate of all the payments being two thousand and fifty dollars and sixty-one cents.

¹⁹³ These entries are entirely inconsistent with the theory that he intended the payments as gifts. His declarations to A. H.

Ulsh, made a few months before his death, and in a much more impressive and solemn manner than the adverse loose declarations, were conclusive that he intended the payments, not as gifts, but as charges against the fund in his hands. This contention was made in the court below, and there a special finding was made, as follows: "We therefore find as a fact that the education was not a gift, and that the guardian is entitled to a credit for the expenses thereof." We treat this finding as we would the verdict of a jury, and we also think it was a correct finding upon the testimony.

There is nothing left of the case but the question of the propriety of the payments made for the appellant's education, and there seems to be little or no contest upon that subject.

In *Eyster's Appeal*, 16 Pa. St. 372, we held that where a guardian permitted the rents of a small property to be received by the widow, and the share of the ward in the rents to be applied by her to the maintenance and education of the ward, who was her son and was residing with her, the guardian is not accountable to the ward for the rents, the said rents not being an unreasonable provision for the purpose.

In *Smith's Appeal*, 30 Pa. St. 397, we held that a guardian was entitled to credit for moneys advanced to his ward to enable him to complete a medical education.

In *Shollenberger's Appeal*, 21 Pa. St. 337, Woodward, J., said: "These authorities are sufficient to show that courts of equity do not disregard the claims of guardians when just and well founded. It is a salutary jealousy with which the law regards the conduct of guardians; but where they have advanced moneys to educate their wards, to pay off encumbrances, or to repair and improve their estate, and where the advancements have not been imprudently made, and are not disproportioned to the value of the estates, natural justice demands that they should be reasonably compensated."

We regard these rulings as fully applicable to the present case. We do not see how any orphans' court having jurisdiction could refuse to give the guardian authority, upon a petition presented for the purpose, to expend the whole fund in hand, if necessary, to extricate the ward from her fearful condition. ¹⁰⁴ This decedent not only did that, but he expended nearly twice as much as the principal, and considerably more than the principal and interest combined would be, and then closed his relations with her by giving her by his will about everything he could give her consistently with a reasonable provision for the support of her

mother, who was his own daughter. If she marries, she and her children will take the whole estate of the decedent in due time, and if she remains single, she will have the whole income of the estate for life upon the death of her mother.

The decree of the court below is affirmed, and appeal dismissed, at the cost of the appellant.

GUARDIAN AND WARD—RIGHTS AND LIABILITIES OF ONE ASSUMING TO ACT AS GUARDIAN.—A stranger taking possession of an infant's estate without appointment as guardian, merely as husband of such infant's mother, who was administratrix of the father, will be held liable as guardian in a court of equity: *Davis v. Harkness*, 1 Gilm. 173; 41 Am. Dec. 184. A stranger or wrongdoer who takes possession of an infant's property may, in equity, be considered as the guardian of the infant and liable to account as such: *Van Epps v. Van Deusen*, 4 Paige, 64; 25 Am. Dec. 516.

CARPENTER'S ESTATE.

[170 PENNSYLVANIA STATE, 203.]

HEIRSHIP, FORFEITURE.—THE MURDER OF A FATHER BY HIS SON does not justify the court in disregarding the statutes of descents and distributions, by which the son inherits as heir of the father.

J. Howard Neely and W. U. Hensel, for the appellants.

J. N. Keller, J. C. Bucher, and W. H. Sponsler, for the appellees.

207 GREEN, J. The penalty for murder in the first degree in Pennsylvania is death by hanging. No confiscation of lands or goods, and no deprivation of the inheritable quality of blood, constitutes any part of the penalty of this offense. The declaration of rights, article 1, section 18, of the constitution of the state, declares that "no person shall be attainted of treason or felony by the legislature," and by section 19 it is provided that "no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth. The estate of such persons as shall destroy their own lives shall descend or vest as in cases of natural death; and, if any person shall be killed by casualty, there shall be no forfeiture by reason thereof." These are provisions of the organic law, which may not be transcended by any legislation. Inasmuch as the prescribed penalty for murder is death by hanging (*Crimes Act 1860*, sec. 75; *Brightly's Purdon's Digest*, p. 511, pl. 232), without any forfeiture of estate or corruption of blood, it cannot be said that

any such consequence can be lawfully attributed to any such offense. In other words, our constitution positively prohibits any attainder of treason or felony by the legislature, and any corruption of blood by reason of attainder or any forfeiture of estate, except during the life of the offender.

²⁰⁸ The legislature has never imposed any penalty of corruption of blood or forfeiture of estate for the crime of murder, and therefore no such penalty has any legal existence.

In the case now under consideration, it is asked by the appellants that this court shall decree that, in case of the murder of a father by his son, the inheritable quality of the son's blood shall be taken from him, and that his estate, under the statute of distributions, shall be forfeited to others. We are unwilling to make any such decree, for the plain reason that we have no lawful power so to do.

The intestate law in the plainest words designates the persons who shall succeed to the estates of deceased intestates. It is impossible for the courts to designate any different persons to take such estates without violating the law. We have no possible warrant for doing so. The law says if there is a son he shall take the estate. How can we say that, although there is a son, he shall not take, but remote relatives shall take who have no right to take it if there is a son? From what source is it possible to derive such a power in the court? It is argued that the son who murders his own father has forfeited all right to his father's estate, because it is his own wrongful act that has terminated his father's life. The logical foundation of this argument is, and must be, that it is a punishment for the son's wrongful act. But the law must fix punishments; the courts can only enforce them. In this state, no such punishment as this is fixed by any law, and therefore the courts cannot impose it. It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father's estate. Where is the authority for such a contention? How can such a proposition be maintained, when there is a positive statute which disposes of the whole subject? How can there be a public policy leading to one conclusion, when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute prescribes that, upon the death of a person, his estate shall vest in his children, in the absence of a will, how can any doctrine, or principle, or other thing called public policy, take away the estate of a child, and give it to some other person? The intestate law casts the estate upon certain designated persons, and this is absolute

and peremptory, and the estate cannot be diverted from those persons ²⁰⁹ and given to other persons without violating the statute. There can be no public policy which contravenes the positive language of a statute.

The supposed analogies derived from the fraudulent abuse of a contract right, or an actual notice accomplishing the same result as a constructive notice under the recording acts, or the waiver of an exemption act by one entitled to its benefits, and other instances of a similar character, are no analogies at all. There may be reasons why a statutory provision may not be applicable in a given case, when the purpose of the statute is subserved in a different mode, or dispensed with altogether, but here is a contingency which does not depend upon any act, or omission to act, of any person whatever. It is the act of the law which casts the descent of estates, and that is not regulated or controlled by the acts, the follies, the frauds, or the crimes of any individual persons. Unless the law itself contains some qualification which changes its application, or provides some disqualification by way of penalty, it must have its way, because there is no other way.

If we consider the question upon authority, we find the great preponderance of judicial decision in accord with the views above expressed. In view of the dreadful and unnatural character of the crime of the son in this case, it is not a matter of wonder that the precise question has never yet been before us, and that there is a dearth of authority among the tribunals upon such a subject.

In the case of *Owens v. Owens*, 100 N. C. 242, Sarah Owens was convicted of being an accessory before the fact to the murder of her husband. She was sentenced to imprisonment for life, and, while undergoing her sentence, she petitioned the court to assign her dower in the real estate of her deceased husband. In allowing her petition, the court said: "We are unable to find any sufficient grounds for denying to the petitioner the relief which she demands; and it belongs to the law-making power alone to prescribe additional grounds of forfeiture of the right which the law itself gives to a surviving wife. Forfeitures of property for crime are unknown to our law, nor does it intercept, for such cause, the transmission of an intestate's property to heirs and distributees, nor can we recognize any such operating principle."

²¹⁰ In *Deem v. Milliken*, 6 Ohio Cir. Ct. 357, the facts were, that Elmer L. Sharkey murdered his mother, for the purpose of succeeding to the title to her real estate. He was convicted and hanged, after having mortgaged the real estate. The collateral

heirs contended that, by reason of his crime, no interest had passed to the son, and therefore the mortgages were void.

In the opinion, the court said: "The statute of descent neither recognizes mischief nor provides a remedy. It is a legislative declaration of a rule of public policy. . . . There should be no difficulty in distinguishing this case from those in which the rights asserted have no foundation, other than the fraudulent or unlawful conduct of a contracting party, nor from those in which attempts are made to use the process of the courts for fraudulent purposes. . . . The natural inference is, that when the legislature incorporated the general rule into the statute and omitted the exception, they intended that there should be no exception to the rule of inheritance prescribed."

In the case of *Shellenberger v. Ransom*, 59 N. W. Rep. 935, the supreme court of Nebraska, reversing its own former decision, reported in 31 Neb. 61, 28 Am. St. Rep. 500, held that the murderer did not forfeit the estate of his daughter, whom he had murdered in order that he might acquire the title to her real estate. At the first hearing, the court followed the decision of a majority of the New York court of appeals in *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819, but changed their ruling on the reargument in 1894. In delivering the second opinion, the court says: "The conclusion reached by the reasoning of Judge Earle in *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819, as well as that in this case, was based very largely on that species of judicial legislation above characterized as rational construction. If courts can thus enlarge statutory enactments by construction, it may be that the references in the majority opinion in *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819, to the provisions of the civil law, were very apt, as illustrating how, by rational interpretation, our statute should be made to read. . . . The legislature has spoken, their intention is free from doubt, and their will must be obeyed. 'It may be proper,' it has been said in Kentucky, 'in giving a construction to a statute, to look to the effects and consequences, when its provisions are ambiguous or the legislative intent is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, ²¹¹ its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action.' "

The case of *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819, was decided by a divided court, but it was a case of devise, and not of descent, and involved only the question of permitting a devisee to take title under the will of a testator whom he murdered

in order to get the property devised to him by the will. While we do not agree to the conclusion reached, the case only involved the operation of a private grant, and therein differs widely from a case in which the statutory law of descent is in question. In the former case, it was only necessary to set aside an instrument between private parties on the ground of fraud, but in the latter it would be necessary to set aside the positive law of the state.

The case of *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, cited for the appellant, merely decided that proof that the assignee of a policy of life insurance caused the death of the assured by felonious means was sufficient to defeat a recovery on the policy. Mr. Justice Field, delivering the opinion, said: "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he has willfully fired," thus showing that the decision was based entirely upon the ground of fraud upon a contract right.

The case of *Cleaver v. Mutual etc. Life Assn.*, 1 Q. B. 147, also cited for appellant, is of an entirely similar character. It was an attempt to enforce a trust in favor of one who had brought about the conditions essential to its fulfillment by killing the person whose death made it operative. Lord Justice Fry said in the opinion: "If no action can arise from fraud, it seems impossible to suppose it can arise from felony or misdemeanor."

In the argument for appellant, no case is cited which presents the very question which arises on this record. But there are at least the three cases above cited which do involve the same question as this, and they are all decided against the contention of the appellant. These authorities appear to us to be far more in consonance with sound principle than those which are seemingly, though not really, of an opposite tendency, and they ²¹² certainly harmonize with the views we entertain. The assignments of error are not sustained.

The decree of the court below is affirmed, and the appeal is dismissed, at the cost of the appellant.

WILLIAMS, J., dissenting. I concur in the disposition of so much of the fund as is derived from the estate of Mrs. Carpenter, who was convicted only of being an accessory after the fact to the murder of her husband. I dissent from the disposition of so much of it as is derived from the alleged estate of the son, who was convicted of murder, and whose crime was committed for the

purpose of securing the property of his father. The son could not, by his own felony, acquire the property of his father, and be protected by the law in the possession of the fruits of his crime.

DESCENT—DECEDENT MURDERED BY HEIR.—A person cannot take by inheritance the estate of a person whom he murders for the purpose of removing the life that stands between him and such estate: *Shellenberger v. Ransom*, 31 Neb. 61; 28 Am. St. Rep. 500, and note.

THOMAS v. CARTER.

[170 PENNSYLVANIA STATE, 272]

INSANE DELUSIONS.—A man may be of sound mind in regard to his dealings in general while he is under an insane delusion, and whenever it appears that his will was the direct offspring of his partial insanity or monomania, which was the cause of the disposition made by him of his property, and that without it such disposition would not have been made, it should be disregarded.

IF A MONOMANICAL DELUSION, HAVING NO FOUNDATION IN FACT. is entertained by a testator toward his wife, daughter, or other heir, and is shown to have been the operative motive which caused the disinheriting of him or her by his will, it must be disregarded, as being the product of an insane delusion.

Contest of the will of Charles Carter, on the ground that he, when making it, was not of sound, disposing mind, memory, and understanding. By his will he disinherited two of his daughters. At the trial, a hypothetical question was put to a witness, who was an expert in nervous diseases, from which question the other evidence in the case is sufficiently apparent. This question was as follows:

“Q. You will understand that these facts which I put to you are on the assumption of their existence, which I will ask you to answer. I put to you the case of a man, whom we will call Dr. Smith. I state to you certain things concerning him, which I will ask you to assume as true, and, upon this assumption of their truth, I will hereafter ask your expert opinion concerning his testamentary capacity.

“The facts I ask you to assume to be true, upon which I will ask your opinion, are these: Dr. Smith died in his seventy-first year, in 1888. He was educated as a physician. After 1845 he never practiced as a physician. About the year 1874, he formed the habit of taking, habitually, various medicines, such as opium, morphine, cannabis indica, acetate of lead, calomel. He continued in this habit until his death, taking, as the years went on, more frequent, and certainly in the last four years of his life daily, and often several times per day, doses of one or the other

of these—doses before and after each meal and at night being habitually taken. From time to time, he was warned by physicians whom he consulted, these physicians being men of high standing in their profession, that this habit of drug-taking was a dangerous one, and would injure him. He disregarded their warnings, however, and continued the habit. In 1885, and thereafter, he, at times, had unconscious spells. Late in 1883, and thereafter, in the belief that he was too weak and infirm to go out as he formerly had done, though really able to do so, he practically shut himself up in his own room, only going down stairs occasionally until 1885, and thereafter scarcely, excepting when he was taken away from the city in the summer. In 1883, and subsequently for four years later, the different physicians whom he consulted repeatedly urged him to cease from the medication in which he was indulging, and to take fresh air and exercise. He refused to follow their advice, and from 1883 until his death he confined himself more and more closely to his bed, and required his food to be cut up and fed to him after the beginning of 1885, though he had the full use of his hands. Occasionally, he suffered from liver trouble, from diarrhoea, and toward the last from gall stones of a painful character. He persisted in confining himself to the room, though repeatedly urged by the physicians to go out, as it would do him good. Dr. Smith was educated and intelligent. He had always been very positive in his opinions, and forcible in asserting them. He was always desirous of having his own way, and of ruling his family. He was always somewhat arbitrary. In the winter of 1884-85 his character changed in the following particulars, and the change continued until death in 1886. He became more irritable, exceedingly suspicious, and very violent when opposed in opinion or action. He would speak, during 1885, of his poverty and inability to meet his bills, though in very easy financial circumstances, having an income of about ten thousand dollars per annum, and his wife having about the same income, which was contributed to family support, the income being derived from well-invested property, real and personal estate of Dr. Smith, worth nearly five hundred thousand dollars. The change with regard to his suspiciousness reached such a stage that, in the winter of 1884, and subsequently, until his death, he not only accused persons of dishonesty without the slightest foundation, of stealing money, but he also, without the shadow of cause, accused, to members of his family, in 1885, his confidential legal adviser, upon whom he relied, and continued to rely, for business advice, and whom he named, late in 1886, an executor and trustee of

his alleged will, of cheating and robbing him. In 1884 and 1885, he accused his children of not loving him, though they were most affectionate and devoted to him. He then said that one of his sons, who was devoted to him, was wishing that he was dead. In 1885, without truth, he said of his devoted wife, to a son and to a daughter, though for years he had been relying upon her for attention, that he must be careful what medicine he took from her, as he did not know but what she might make away with him.

"In March, 1885, a gentleman who, with his knowledge and without any dissent, had been visiting at his house, and with whom, for months previously, he had been on very friendly terms, became engaged in marriage to his daughter. This gentleman was a man of good social position, of excellent character, and was superintendent of a manufacturing corporation, which paid him a salary of three thousand dollars per annum. Immediately upon the announcement of the engagement, Dr. Smith became excessively enraged, threw his arms about, and pounded on the floor with his cane, screamed, and cried. From this time forward, until 1887, he recurred frequently, with different persons, to the subject of the proposed marriage. When he did so, he would be wild, excited, distracted, incoherent, despairing, and frenzied in his manner and talk. He would frequently, during such times, burst into tears, crying and sobbing like a child. He was repeatedly, during this period, questioned, when this topic was discussed, as to his reasons for objecting to the match. He gave no better reasons than these: he said he would never permit his daughter to marry a man who lived on a salary, even though it was twenty thousand dollars a year; at other times, he said that the man had light hair; that he looked like boiled veal; that he would allow no man to marry his daughter who had permitted a horse to run off; that he was a knave (there being no foundation for this last charge); that he (Dr. Smith) was battling for the family institution; that his daughter was bad, and always had been bad (though she had always been of the purest character, and, prior to this engagement, he had been devoted to her). On one occasion, in the spring of 1885, when pressed for his reasons by a son in law, he said, with a wild look in his eye, 'I will tell you. I have a reason. . . . I will allow no daughter of mine to marry for such a reason. This is my real reason.' Within six months this was repeated in substance by Dr. Smith to his son. His outbursts concerning this matter were such that, though his wife was quiet and devoted in her manner to him, and avoided as much talk as

possible upon the subject, and took no active part in the engagement, she was repeatedly, in order, as she properly believed, to save him from injury because of such outbursts, obliged, as early as 5 o'clock in the morning, to leave the room in which they were sleeping, and to go downstairs. He often asserted, after the announcement of the engagement, that all his family were in a conspiracy against him. He said, without being able to give any better reasons than I have assigned for his objection to the marriage, that he would disinherit every child who in any way would countenance the marriage, or, if it took place, would thereafter hold any intercourse with his daughter. In the latter part of 1884, a deterioration in the business ability of Dr. Smith was perceived, which continued, increasingly, until his decease, manifesting itself, amongst other ways, in an increasing inability to balance his books and cause proper entries to be made therein.

"Assuming that all these facts which I have stated to you are true concerning the hypothetical Dr. Smith, I ask you whether, in any part of December, 1886, he, in your opinion, possessed a sound mind?"

"A. In my opinion he was not."

Objections were made to this and other questions when asked, and the action of the trial court in allowing them to be answered was duly excepted to. Verdict and judgment were against the validity of the will.

Samuel Dickson and Mayer Sulzberger, for the appellant.

John G. Johnson, for the appellees.

²⁸¹ PER CURIAM. In this issue, devisavit vel non, framed for the purpose of trying and determining the three questions of fact recited therein, John M. Thomas, sole acting executor of the writing ²⁸² purporting to be the last will and testament of Charles Carter, deceased, is plaintiff, and Williams Carter and others, including all the children and heirs at law of said decedent, are defendants.

The proper solution of these questions depended, of course, upon a variety of minor facts and circumstances, calculated to shed light on one or more of said main questions, and thus enable the jury to reach a correct conclusion as to each of them. This necessitated the introduction of a mass of testimony, which was submitted to and passed upon by the jury. The cause appears to have been carefully and ably tried in the court below. We have given to the questions presented by the record that consideration which their importance and the interests involved appear to re-

quire, and we are all of opinion that there is nothing in the assignments of error that would justify us in disturbing the judgment that was entered on the verdict in favor of the defendants; nor do we think that either of the specifications of error requires special notice. The case depended mainly on questions of fact which were for the exclusive consideration of the jury, and to them it appears to have been fairly submitted in a clear and comprehensive charge, in which the principles of law, applicable to the facts which the testimony tended to prove, were fully and accurately stated. We find no error in the admission or rejection of evidence. Our examination of the testimony that was received and submitted to the jury has satisfied us that the findings of fact, of which their verdict is necessarily predicated, were fully warranted by the evidence; and hence there appears to be nothing on which to base a reversal of the judgment.

In affirming defendant's requests for charge, the following substantially correct instructions were given to the jury, by the learned trial judge, to guide them in properly applying the facts, as they might find them from the testimony, to the questions presented in the feigned issue:

"A man may be of sound mind in regard to his dealings in general, but he may be under an insane delusion, and whenever it appears that the will was the direct offspring of the partial insanity or monomania under which the testator was laboring at the very time the will was made, that it was the moving cause of the disposition, and, if it had not existed, the will would have ~~not~~ been different, it ought to be considered no will, although the general capacity of the testator may be unimpeached."

"The wife and children of a man are the natural objects of his affections, and where they are disinherited by a husband and a father, when he comes to dispose of his estate, the reasons for doing so are a proper subject to enter into the consideration of a jury in considering a case like the present, and any person will naturally inquire, Why was this thing done? Was the testator under an insane delusion, or has some powerful cause induced him to act thus?"

"If a monomaniacal delusion is unalterably entertained against a wife or a daughter, who otherwise would have been his legatee or devisee, and who would seem to be the natural object of a man's regard when he came to make a final disposition of his estate, and such delusion is shown to have been the operating motive which excluded them; and if the supposed act or misconduct, on the part of the wife or child, or both, had no existence

in fact, and was a creature of the diseased imagination of the testator, and the will was engendered by this delusion, and was its offspring, and made under its influence operating at the time and in the testamentary act; if, in short, the will was dictated by the delusion, it cannot be sustained as a last will and testament, because it is the production of a mind incapable of a correct reasoning as to the object of his bounty and the character of his wife and children, and their relations toward himself."

These and other instructions of like import in the general charge were fully warranted by the testimony; and, on principle as well as authority, they were neither erroneous nor misleading: *Taylor v. Trich*, 165 Pa. St. 586; 44 Am. St. Rep. 679; *Boughton v. Knight*, L. R. 3 Pro. & D. 64. In the former, after defining "partial insanity" as "a derangement of one or more of the faculties of the mind, which prevents freedom of action," it was said: "The question in any given case is, whether the act under investigation was done upon consideration of existing facts, or under the influence of a delusion that controlled the will of the doer, and destroyed his freedom of action." In its controlling principle, that case is not unlike the one before us.

Judgment affirmed.

WILLS—INSANE DELUSIONS, WHEN INVALIDATE.—Partial insanity, sufficient to avoid a will, is a mental derangement of one or more faculties of the mind, which prevents freedom of action, and the question to be determined in any given case is, whether the act under investigation was done upon consideration of existing facts, or under influence of a delusion that controlled the will of the testator, and destroyed his freedom of action: *Taylor v. Trich*, 165 Pa. St. 586; 44 Am. St. Rep. 679, and note. Monomania, amounting to insanity, upon a single subject possessed by a testator, as evidenced by an unequal and unnatural disposition of his property made by him in his will, and such as must avoid it, is such an insane delusion as renders him incapable of reasoning on that particular subject, and shows that he assumed to believe to be true that which has no foundation or reason in fact: *Haines v. Hayden*, 95 Mich. 332; 35 Am. St. Rep. 566, and especially note.

COMMONWEALTH v. PAUL

[170 PENNSYLVANIA STATE, 284.]

INTERSTATE COMMERCE. — THE QUESTION WHETHER A PACKAGE in which goods are offered for sale and sold is an original package, is a question for the jury when the facts are in dispute, but is a question of law when they are agreed upon, and are presented by a special verdict.

ORIGINAL PACKAGE.—A package devised by a nonresident manufacturer, adapted for the sale at retail to individual consumers of his goods, and in which they are sold to such consumers by him or his agent, is not an original package, within the meaning of the law relating to interstate commerce.

A TUB OF OLEOMARGARINE, CONTAINING TEN POUNDS, put up for the purpose of being sold at retail, is not an original package, the sale of which is protected by the law of interstate commerce.

A STATE HAS POWER TO PUNISH SALES OF OLEOMARGARINE contained in tubs not exceeding ten pounds in weight. To do so is not to interfere with the power of Congress to regulate interstate commerce.

Carroll R. Williams, John G. Johnson, A. Morton Cooper, and George S. Graham, district attorney, for the appellant.

A. B. Roney, Henry R. Edmunds, and Richard C. Dale, for the appellee.

²⁸⁹ **WILLIAMS, J.** It is not necessary to the decision of this case that we should enter upon the discussion of the existence and extent of the police power residing in the several states of the Union. It is quite unnecessary to argue that the power of Congress to regulate commerce between the citizens of the different states was not intended to abridge the lawful exercise of the police power by any of the state governments. If judicial decisions can be said to settle any question, these questions are clearly and properly settled by the decisions of the highest tribunal known to our laws and settled in accordance with the rules laid down in this state since its first organization. In *Powell v. Pennsylvania*, 127 U. S. 678, the right of this state to deal, in the exercise of its police power, with the manufacture and sale of oleomargarine, and the validity of the particular statute under consideration in this case, were distinctly affirmed. During the last year (1894), a Massachusetts statute relating to the same subject came before the supreme court of the United States in *Plumley* ²⁹⁰ *v. Massachusetts*, 155 U. S. 461, and was sustained as a lawful exercise of the police power. The defendant in that case had, as the defendant in this case has, a license from the internal revenue department of the United States authorizing him to deal in oleomargarine. It was held, however, that this did not authorize him to engage in the manufacture

or sale of oleomargarine in violation of the state laws, lawfully passed, forbidding or regulating such manufacture and sale. The dealer in articles which the state, in the exercise of its police power, places under restrictions, must make his peace with the state in which his business is conducted, as well as with the internal revenue laws of the United States. This proposition the defendant denies. He has made his peace with the tax laws of the United States, but denies the power of the state to regulate or restrict his sales of the commodity in which he deals, and asserts that he is engaged in interstate commerce within the true intent of the constitutional provision conferring upon Congress the power to regulate commerce between the several states.

In determining the question thus raised, it is important to keep in mind the facts found by the special verdict, as follows: 1. The defendant is a resident in and citizen of this state, with a store or place of business at No. 214 Callowhill street, Philadelphia; 2. He is conducting the sale of oleomargarine as the agent for "Chicago Butterine Company," which is a firm or corporation doing business in Illinois, and is the licensed dealer at No. 214 Callowhill street; 3. The oleomargarine was not made from milk or cream; it was designed to be used in place of butter; it was sent from Chicago to Philadelphia to be sold as food, and the tub sold to Crawford, which is complained of in this case, was sold to him for use as an article of food; 4. The tub contained ten pounds only, was put up, sealed, and stamped at the factory in the state of Illinois, was received in the same form in Philadelphia, and then "placed in defendant's store and offered for sale as an article of food"; 5. This was one of "many transactions of like character made by the defendant during the last two years"; or, in other words, this was the way in which the defendant did business for his nonresident principals, the manufacturers. They put up the article in ten pound packages, suited for the retail trade, and, because they do not allow their agents to open or divide these, they ²⁰¹ treat their trade as wholesale, though, in fact, they supply the actual consumer and not the retail dealers. Looking now at these facts in the light of the cases cited, we shall find every question raised by them has been decided against the defendant by the supreme court of the United States, except one. The validity of our act of assembly has been distinctly affirmed as a lawful exercise of the police power. The fact that an internal revenue license affords the defendant no justification for disregarding a lawful exercise of the police power by the state is stated with equal clearness. The proposition that the judi-

ciary of the United States should not strike down the police power of the states in the exposition of the interstate commerce powers of the general government, was asserted and abundantly vindicated in *Plumley v. Massachusetts*, 155 U. S. 461, decided within the last year. Our statute is directed especially against the sale of oleomargarine as an article of food. The defendant, in willful and flagrant disregard of the letter, as well as the spirit, of the statute, keeps these tubs, of the commodity manufactured by its principals, at the store in Callowhill street, for sale "as an article of food." He offers them for sale for use as an article of food, and he sold to Crawford the ten pound tub which is the ground for complaint in this case for use as food. Now it is very clear that this sale was a violation of our statute. The conviction was eminently proper, therefore, and should be sustained, unless the sale can be justified as one made of an original package, within the proper meaning of that phrase. The nonresidence of the manufacturer does not play any important part in this case, for he comes into this state to establish a "store" for the sale of his goods, pays the license exacted by the revenue laws, and puts his agent in charge of the sale of his goods from his store, not to the trade, but to customers. We have, therefore, a Pennsylvania store, selling its stock of goods to its customers for their consumption, from its own shelves; and, unless these goods are in such original packages as the laws of the United States must protect, the sale is clearly punishable under our statute.

We first encountered this question of what shall constitute an original package, within the meaning of our national interstate commerce legislation, in *Commonwealth v. Zelt*, 138 Pa. St. 615. A nonresident manufacturer of intoxicating drinks put ~~292~~ up his whisky and other liquors in quart and pint bottles adapted for use in the retail trade to consumers. These he sent to an agent in charge of a store rented for the purpose in Washington, Pennsylvania, the bottles were corked, some sealing wax put over the cork, and the brand or initials of the manufacturer impressed thereon. The bottles so secured were then put in pasteboard boxes or covers, and packed in open boxes or barrels for shipment to the Pennsylvania store. When they were received at the store, the bottles were arranged and displayed on the shelves, and offered for sale to the consumer, as original packages of whisky. Neither the distiller who shipped the whisky nor his agent who sold it had a license to sell intoxicating drinks under the liquor laws of this state, but made sales of whisky and beer by the pint and quart, under the pretense

that each bottle was an original package of commerce. The learned judge before whom an indictment against the seller of the bottles of liquor was brought to trial submitted the question to the jury, whether this method of putting up the liquors in bottles was not adopted as a device to evade the liquor laws of this state. The jury found the fact to be that it was a mere device and rendered a verdict of guilty. Upon an appeal to this court, the ruling of the court below was affirmed, and in speaking on the second assignment of error, he said that whether whisky or beer could be put up in pint bottles, and sold by the single bottle as an original package under the protection of the interstate commerce laws, was a question that would be decided when it was squarely raised. The question was next raised in *Commonwealth v. Shollenberger*, 156 Pa. St. 201, 36 Am. St. Rep. 32, and its decision became necessary to the disposition of that case. In that case, a nonresident manufacturer of oleomargarine had established a store for its sale in Philadelphia, and held a license under the internal revenue laws authorizing such sale. His agent sold a tub of "the goods" to a boardinghouse keeper for use in the place of butter on his table.

The defense was, that the tub had not been broken or divided by the seller, and was, therefore, an original package, within the meaning of the interstate commerce cases. We held that the conclusion did not follow from the fact stated, and attempted to define an "original package" as such a package as was used in good faith by producers and shippers for convenience in ²⁹³ handling and security in transportation of their wares in the ordinary course of actual commerce. But we also said that, where the size of the package was adapted for the retail trade, so that "breaking of bulk" was not necessary to "reduce the goods into the common mass" and fit them for the retail trade, the traffic so conducted was not interstate, but intrastate commerce, or, in other words, the common, every-day, retail traffic of the community in which the store was located. Let us look at the consequences of the adoption of the opposite rule. If a pint bottle of whisky is an original package under the protection of Congress, and can be sold as such, regardless of the police legislation of the state, we cannot punish the sale to a minor, to a person of known intemperate habits, to a lunatic, on election days, or on the Sabbath. All power over the traffic for police purposes is gone. And why? Because the power to regulate interstate commerce, intended to guard against stoppage along state lines for examination or the collection of customs

duties, has been extended by construction, until it is made to reach and protect a retail traffic carried on within any state, if the things sold have come into the retailer's store from a non-resident manufacturer or shipper. If this be a sound construction, then the power of a state to restrict or prohibit an injurious traffic does not depend on the deleterious character of the thing sold, or the manner in which sales are made, or the public or private injury inflicted by the sale, but on the manner in which the thing sold comes into possession of the seller. If he makes the article, or buys it of another citizen of the state, he cannot sell it without punishment. If he buys it of a nonresident, who sends it to him across the state line, he may sell it with impunity, and the state is powerless to stay his hands or to regulate his sales. A pint of whisky put up in a flask, if made or bought in this state, cannot be sold without a license, granted by the courts after an examination into the character of the applicant and his business. The same flask of whisky put up across the border may come as an original package into any community, and be sold to any person, whether a minor, a drunkard, or a lunatic, under the protection of the constitution of the United States.

We cannot adopt a construction that seems to us so unnatural and unreasonable, and that would work such absurd and monstrous results. On the contrary, we hold, as we think is held by the recent case of *Plumley v. Massachusetts*, 155 U. S. 461, that the mere fact that a police law may affect the trade in articles brought from another state does not amount to an attempt to regulate interstate commerce, or to an assumption of power belonging to Congress. Coming now to the facts of this case, we find the alleged "original package of commerce" to be a small tub of oleomargarine, containing ten pounds, and, in fact, sold to a consumer for use as an article of food upon his table. It is true that the defendant treats his trade as one carried on at wholesale, but the facts of the special verdict show that this is not because he supplies dealers, or sells in large quantities for shipment, but because he treats the little tubs and packages he sells his customers as "original packages of commerce," and his law-breaking traffic as "interstate commerce." He does not "break bulk" by taking one pound out of a package, and weighing it on his scales for the supply of a customer, but requires him to take a whole tub, whether of ten pounds, or of two, or of one, is immaterial, but it must be a whole package as it was put up at the factory. If the pint bottle or the pound package has not been opened and divided before the sale, the contention is,

that it has not become a part of "the common mass" of property entering into the ordinary business of the citizens of the state, but is an original package, under the protection of Congress as interstate commerce. The question to which we are thus brought is the same that was encountered in *Commonwealth v. Schollenberger*, 156 Pa. St. 201; 36 Am. St. Rep. 32. It is whether a package, intended and used for the supply of the retail trade, is an "original package," within the protection of the interstate commerce cases.

We held in that case that a manufacturer who puts up his products in packages evidently adapted for and intended to meet the requirements of an unlawful retail trade in another state, and sends them to his own agent in that state for sale to consumers, is not engaged in interstate commerce, but is engaged in an effort to carry on a forbidden business by masquerading in a character to which he has no honest title. We are not dealing with the legislative question. Whether the trade in oleomargarine is injurious, and should be restricted, is a question that has been decided for us. It has been declared injurious. ²⁹⁵ It has been placed under restrictions. These restrictions have been held to be a valid exercise of the police power, both by this court and the supreme court of the United States. Our question is, whether this valid restriction can be enforced, or whether the transparent trick of putting up oleomargarine in small packages in another state, so that it can be sold at retail to consumers as an article of food, will clothe an unlawful retail traffic with the coat of mail belonging to honest, legitimate, interstate commerce, and set the police laws of the state at defiance. In disposing of this question, we hold as follows: 1. The character of the package, whether original or not, is a question of fact when there are facts to be passed upon bearing upon this question, and should go to the jury; 2. It is a question of law when the facts are agreed upon, or presented by a special verdict, as in this case, and should be decided by the court; 3. It is fair to presume that a package was intended, by him who devised it, for the purpose for which he uses it in his own business; 4. A package devised by a nonresident manufacturer, or put up by him, adapted for sale at retail to individual consumers, such, for example, as a flask of whisky or a tub, or pail, or roll of oleomargarine, and actually sold by him or his agent to the consumer for use as an article of food or drink, in violation of the laws of the state where such sales take place, is not an "original package," within the meaning of the law relating to interstate commerce; 5. The punishment of such sales under the police power of the state is not an inter-

ference with the powers of Congress, or with the commerce between the states which is protected by the constitution of the United States.

The judgment is reversed, and judgment is now entered on the special verdict in favor of the commonwealth. The record is remitted, that sentence may be imposed according to law.

INTERSTATE COMMERCE—ORIGINAL PACKAGE DEFINED. Original packages are bundles put up for transportation or commercial handling, and usually consist of a number of things bound together convenient for handling and conveyance: *State v. Board of Assessors*, 46 La. Ann. 145; 49 Am. St. Rep. 318, and note.

INTERSTATE COMMERCE—OLEOMARGARINE—ORIGINAL PACKAGES.—A sale of oleomargarine, otherwise in violation of a state law, is not protected as a part of interstate commerce by proof that it was made, stamped, and printed in another state for use as an article of food, weighed eighty pounds, and was sold in the form in which the maker put it up at his factory in such other state: *Commonwealth v. Schollenberger*, 156 Pa. St. 201; 36 Am. St. Rep. 32.

LYON v. CLEVELAND.

[170 PENNSYLVANIA STATE, 611.]

SCIRE FACIAS—CONCEALED CONVEYANCE.—If a judgment debtor remains in possession of land of which he has made an unrecorded conveyance, of which the plaintiff has had no notice, the judgment may be revived by scire facias, though the grantee is not a party thereto. He is not a terre tenant of the land, and has no interest of which the plaintiff is bound to take notice.

AN AMICABLE SCIRE FACIAS against the judgment debtor has the same effect as a revival of the judgment by writ of scire facias regularly issued, and therefore binds his grantees who have not taken possession nor recorded their conveyance, if the plaintiff has no notice thereof.

A SECOND SCIRE FACIAS cannot be prosecuted against a judgment debtor on the ground that, before the prosecution of the first, he had made a conveyance of which the plaintiff had no notice, actual or constructive. Because of his want of such notice, he did all he was required to do, and the scire facias has the same effect as if the grantee had been known and had been made a party thereto.

Edward Overton, for the appellant.

J. C. Ingham and D. A. Overton, for the appellee.

615 WILLIAMS, J. This appeal presents an interesting question. It cannot be said to be definitely settled, but its solution will be made comparatively easy by a distinct statement of it, and of the facts on which it arises. The plaintiff is the holder of a judgment against the defendant, which was entered in 1886. It then became a lien upon a valuable farm owned by the defendant and occupied by himself and his family. In 1891, the defendant and his family were still in possession of the farm with-

out visible ^{§16} change. The record showed the title remaining in him. There is no allegation of notice, actual or constructive, that the defendant had parted with his title to anyone. Upon this state of facts, the plaintiff applied to the defendant to revive and continue the lien of the judgment by an amicable scire facias. This was done, and the judgment of revival duly entered on the records by the prothonotary. During the following year, Mrs. Cleveland told the plaintiff that her husband had conveyed the farm to her by a deed executed by him prior to the revival of the judgment by amicable scire facias in 1891. This information started in the mind of the plaintiff the question whether the unrecorded conveyance to Mrs. Cleveland would affect, in any manner, the lien of his judgment as revived by the amicable scire facias signed only by the defendant. He seems to have assumed that this question must have an affirmative answer, and to have turned to consider, in the next place, what it was necessary for him to do in order to preserve the lien of his judgment upon the farm in the hands of Mrs. Cleveland as terre tenant. The answer to the first of these questions will dispose of this appeal and of the appeal of Mrs. Cleveland in another case, which was heard at the same time with this one. We are to inquire, therefore, what effect the secret conveyance by Cleveland to his wife had upon the lien of the plaintiff's judgment upon the farm so conveyed. It may be well to begin this inquiry by considering just what is meant when we speak of the lien of a judgment upon real estate. At common law, a judgment was not a lien upon either personal or real estate. We have no statute that in express words makes a judgment a lien on land. The lien is not an incident of the judgment, therefore, but the result or outgrowth of a succession of statutes subjecting land to seizure and sale upon execution process. Accordingly, it has been uniformly held that a judgment on which a seizure and sale of land is not authorized is not a lien on the real estate of the defendant: *Beam's Appeal*, 19 Pa. St. 453; *Schaffer v. Cadwallader*, 36 Pa. St. 126. Judgments against the commonwealth, against counties and townships, against municipal corporations, and against canal and railroad companies belong to this class. Writs of fieri facias for the seizure and sale of the property of the defendant do not ordinarily issue upon such judgments, but other methods of compelling payment are provided ^{§17} by statute. When the right to seize and sell land in satisfaction of a judgment does exist, it must be exercised within such period as the law giving the right may appoint. Formerly, this period was a year and a day, and, if this was allowed to elapse, the plaintiff was required to

ference with the powers of Congress, or with the commerce between the states which is protected by the constitution of the United States.

The judgment is reversed, and judgment is now entered on the special verdict in favor of the commonwealth. The record is remitted, that sentence may be imposed according to law.

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615 WILLIAMS, J. This appeal presents an interesting question. It cannot be said to be definitely settled, but its solution will be made comparatively easy by a distinct statement of it, and of the facts on which it arises. The plaintiff is the holder of a judgment against the defendant, which was entered in 1886. It then became a lien upon a valuable farm owned by the defendant and occupied by himself and his family. In 1891, the defendant and his family were still in possession of the farm with-

out visible ⁶¹⁶ change. The record showed the title remaining in him. There is no allegation of notice, actual or constructive, that the defendant had parted with his title to anyone. Upon this state of facts, the plaintiff applied to the defendant to revive and continue the lien of the judgment by an amicable scire facias. This was done, and the judgment of revival duly entered on the records by the prothonotary. During the following year, Mrs. Cleveland told the plaintiff that her husband had conveyed the farm to her by a deed executed by him prior to the revival of the judgment by amicable scire facias in 1891. This information started in the mind of the plaintiff the question whether the unrecorded conveyance to Mrs. Cleveland would affect, in any manner, the lien of his judgment as revived by the amicable scire facias signed only by the defendant. He seems to have assumed that this question must have an affirmative answer, and to have turned to consider, in the next place, what it was necessary for him to do in order to preserve the lien of his judgment upon the farm in the hands of Mrs. Cleveland as terre tenant. The answer to the first of these questions will dispose of this appeal and of the appeal of Mrs. Cleveland in another case, which was heard at the same time with this one. We are to inquire, therefore, what effect the secret conveyance by Cleveland to his wife had upon the lien of the plaintiff's judgment upon the farm so conveyed. It may be well to begin this inquiry by considering just what is meant when we speak of the lien of a judgment upon real estate. At common law, a judgment was not a lien upon either personal or real estate. We have no statute that in express words makes a judgment a lien on land. The lien is not an incident of the judgment, therefore, but the result or outgrowth of a succession of statutes subjecting land to seizure and sale upon execution process. Accordingly, it has been uniformly held that a judgment on which a seizure and sale of land is not authorized is not a lien on the real estate of the defendant: *Beam's Appeal*, 19 Pa. St. 453; *Schaffer v. Cadwallader*, 36 Pa. St. 126. Judgments against the commonwealth, against counties and townships, against municipal corporations, and against canal and railroad companies belong to this class. Writs of fieri facias for the seizure and sale of the property of the defendant do not ordinarily issue upon such judgments, but other methods of compelling payment are provided ⁶¹⁷ by statute. When the right to seize and sell land in satisfaction of a judgment does exist, it must be exercised within such period as the law giving the right may appoint. Formerly, this period was a year and a day, and, if this was allowed to elapse, the plaintiff was required to

warn the defendant by a writ of *scire facias post annum et diem* before he could seize the defendant's land in satisfaction of his judgment. While the right of seizure lasted, the judgment was said to be a lien on the defendant's real estate.

When the right of seizure was lost by lapse of time, the judgment was said to have lost its lien. By our act of April 16, 1845, the plaintiff's right to seize land was extended from a year and a day to five years from the date on which the judgment was entered. The judgment is, therefore, said to be a lien for five years from its date upon all the real estate owned by the defendant at that time, because the plaintiff may levy upon and sell such real estate for the collection of the sum due him on his judgment at any time within five years. If the five years are allowed to expire, the plaintiff is in the same situation that he would have been in under the old law limiting his right to execution to a year and a day. His right to seize the defendant's land is lost by the lapse of time; or, in other words, the judgment has lost its lien, since it will not support execution process until regularly revived. The revival of a judgment means simply a new award of execution process for its collection. This may be had by means of a writ of *scire facias*, which, after the expiration of five years, is, in effect, a *scire facias quare executionem non*. If issued before the expiration of five years, it is a *scire facias* to revive and continue the lien of the judgment for another period of five years. Judgment of revival may be had also by the consent of the defendant without a writ. Such a revival is known as an *amicable scire facias*, and authorizes the prothonotary to enter judgment against the defendant for the amount due on the judgment, and that the lien of the judgment be extended for another period of five years. This judgment may be again revived as often as the lapse of time may require, either amicably or by writ, and the right of the plaintiff to resort to the real estate owned by the defendant when the judgment was entered is thereby preserved. The last judgment of the series is that by which the amount of the plaintiff's ⁶¹⁸ demand is ascertained, and his right to execution therefor determined. The several judgments that precede it have served to preserve the plaintiff's right to seize, upon execution process, all the real estate that could have been seized under the original judgment; or, in other words, they have continued the lien of the judgment upon the lands that were originally subject to it. But being more than five years old, they will not support execution process, and have ceased to have any significance, except as supports to the last of the series, and to process issued upon it.

When the defendant in the judgment sells land, the purchaser is bound to take notice of the record. The record informs him of the existence and amount of the judgment; and the law, which he is also bound to know, informs him that the land he is buying is subject to seizure and sale for the payment of the judgment at any time within five years. If he takes possession of the land or records his deed, the plaintiff is bound to take notice of his situation as a terre tenant, and thereafter, upon the revival of the lien of his judgment, to give the terre tenant notice: *Armington v. Rau*, 100 Pa. St. 165. If the purchaser does not record his deed or take possession, but leaves the defendant in undisturbed possession of the land, so that the plaintiff has no knowledge of the conveyance, actual or constructive, he does not become a terre tenant of the land, and has no interest therein of which the plaintiff can take notice. As between himself and his vendor, he may have a good title, but as to the lien creditor he has none, because the conveyance to him is and remains a secret one, while the vendor is permitted to remain in possession in the same manner as before the secret conveyance was made. Under such circumstances, the revival of the judgment against the defendant is all that is possible to the creditor, and it will continue the right to seize and sell the real estate which was subject to seizure under the preceding judgment or judgments of the series. It can make no difference whether the judgment of revival is obtained by means of the writ of scire facias regularly issued, or by an amicable scire facias. It is a judgment against the defendant who was the owner of the land when the judgment was entered, and who remains so to all appearances, and as to all means of knowledge open to the creditor. If the creditor or the purchaser must lose, and if both of them may be said to be innocent parties, then the ⁶¹⁹ loss must fall on him whose neglect to give notice has occasioned the omission or failure complained of. But if the purchaser records his deed, or enters into the actual possession of the land, he becomes a holder of the land bound by the judgment, a terre tenant, of whose position and interest the judgment creditor is bound to take notice, at his peril. If thereafter the plaintiff in a judgment against the vendor disregards the position of the terre tenant, and revives his judgment without legal notice to him, he will lose his lien, as to the lands so acquired by the terre tenant, at the end of five years from the time when the notice of the terre tenant's title can be brought home to him. It remains to apply these principles to the facts of this case. The judgment held

by Conklin was entered against Cleveland in 1886. The defendant then owned the farm on which he lived, and the judgment became a lien upon it.

In 1891, the state of the record and of the possession remained the same as in 1886. The plaintiff, having, therefor, no notice of any change in the title, revived his judgment by an amicable scire facias signed by the defendant. This judgment of revival continued the right of the plaintiff to execution against all the lands previously bound by the judgment entered in 1886; in other words, it continued the lien of the judgment upon all such lands against the defendant and all persons claiming under him by means of any secret conveyance. Mrs. Cleveland held such a conveyance. She was bound to know of the judgment and its lien upon the farm. She was bound to know that, if she expected to assert the rights of a terre tenant, it was her duty to make her title public, so that the plaintiff could be fixed with notice of it. She did nothing. The plaintiff did the only thing possible for him. He revived his judgment against the defendant, and we have no doubt that the revival bound the land as to any interest acquired by Mrs. Cleveland, just as completely as it would have done if she had joined in the agreement with her husband. This revival continued the lien of the judgment for five years from the date of its entry, and the subsequent recording of a deed, or notice given in any other manner, could have no retroactive operation. This, then, was the situation when, in 1892, Mrs. Cleveland gave the plaintiff notice that she held a deed for the farm which had been executed before the entry of the judgment upon the amicable scire facias. This notice did not affect the lien of the judgment in the slightest degree. It gave her no rights as a terre tenant, except such as began at that time. The plaintiff and the lien of his judgment stood after the notice was given just as they stood before. There was no reason for taking any precautionary steps, or making any effort to bring Mrs. Cleveland on the record, until it became necessary to revive the judgment again against the defendant. The plaintiff seems to have reached an opposite conclusion. He at once issued a scire facias on the original judgment, which was at the time more than five years old, and named Mrs. Cleveland therein as a terre tenant. This was not only unnecessary, but it was wholly unauthorized. The defendant took defense on the ground that the judgment had been once regularly revived as against him, and that he was not liable to a second judgment for the same cause of action. Mrs. Cleveland took defense on the ground that the lien of the

judgment of 1886 had been lost by lapse of time, and could not be revived against her. The court below overruled the defense set up by the defendant, disposed of Mrs. Cleveland's allegation, that as to her the judgment of 1886, having ceased to be a lien, would not support the scire facias, by admitting evidence to show the continuance of the lien against the defendant, and then rendered judgment against both. This was an error. The writ should not have been issued. Having been issued, the court should have refused to enter judgment upon it against either of the defendants. The plaintiff needed no help until it should become necessary to revive his judgment again. When that time comes, he will issue his writ of scire facias naming Mrs. Cleveland as terre tenant, but he will proceed upon the judgment entered upon the amicable scire facias in 1891, which, as we have seen, binds the land, as well in the hands of Mrs. Cleveland, upon the facts of this case, as in the hands of her husband. But the error into which the plaintiff and the court below fell was not in this case, but, as we have said, in the action brought by scire facias against the defendant, and his wife as terre tenant, on the original judgment entered in 1886.

The judgment appearing upon this record is, therefore, affirmed.

SCIRE FACIAS—AMICABLE—EFFECT.—The filing of an amicable scire facias has the same effect as the issuing of an adverse writ for the same purpose: *Frierson v. Harris*, 94 Am. Dec. 222. See this note further for an exhaustive treatment of the subject of scire facias.

DE LOY v. TRAVELERS' INSURANCE COMPANY.

[171 PENNSYLVANIA STATE, 1.]

INSURANCE, LIFE.—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER means intentional exposure to such danger.

EVIDENCE OF VOLUNTARY EXPOSURE TO DANGER.—The intention of the assured to voluntarily expose himself to unnecessary danger may be inferred from his acting so recklessly and carelessly as to show an utter disregard of known danger, or from his taking a risk of a danger which is so obvious that a prudent man, exercising reasonable forethought, would not have taken it.

A CONDITION EXEMPTING THE INSURER FROM LIABILITY for injuries suffered by the assured while walking or being on a railway bridge or roadbed, does not extend to injuries suffered by him when his business calls him to a track or crossing for a lawful purpose, unless it was in a time of danger, and he willfully exposed himself to such danger.

A CONDITION IN A POLICY EXEMPTING AN INSURER from liability for injuries suffered by the assured while on a railway roadbed does not extend to the whole right of way, but only to that space where a person might be injured by cars running along the track.

Action against an insurance company on a policy insuring against accident the husband of the plaintiff. This policy provided that the insurer should not be answerable for injuries received by the assured from voluntary exposure to unnecessary danger, nor from walking on a railway bridge or roadbed. It was claimed in defense that the decedent had voluntarily exposed himself to unnecessary danger, and had also received an injury resulting in his death, while walking on the track of a railway. The assured was a lumberman, and, in the regular carrying on of his business, went to a station on a railway, where it was the custom of persons to flag trains which they wish to stop. After flagging a train, he was returning to the station, walking by the side of the track, and, either stumbling or slipping, he fell toward the track, and was struck and killed by the engine of an approaching train. The instruction of the court as to what was a voluntary exposure to unnecessary danger, within the meaning of the policy, sufficiently appears from the opinion. With respect to the claim that the defendant was excused from liability, because the injury to decedent occurred while on the roadbed of a railway, the court instructed the jury, that the provision in the policy upon that subject was not intended to exclude the assured from going or being upon a roadbed upon his lawful business, unless it was in a time of danger, when he willfully exposed himself to danger by being there; and that, though he was within the right of way when injured, he could not be deemed upon a roadbed, unless his position was such that he might have been injured by the cars as they were passing and repassing upon the railway. The jury returned a verdict for the plaintiff, and the defendant appealed.

J. A. Beeber, John G. Johnson, and Clarence E. Sprout, for the appellant.

Henry C. McCormick, Frank P. Cummings, and Seth T. McCormick, for the appellee.

¹⁰ STERRETT, C. J. This action was brought on a life insurance policy issued by the defendant company to Francis De Loy, husband of the plaintiff—beneficiary therein named—to recover indemnity for the accidental death of said assured.

The policy contains eight provisions relieving the company from liability, the fifth of which recites thirty-one different kinds of accident for which it is declared the company shall not be liable. Among these exemptions are the two following, which practically constitute the only grounds of defense on which the

defendant relies: 1. "Voluntary exposure to unnecessary danger"; and 2. "Walking or being on a railway bridge or roadbed."

While the specifications of error are eleven in number, they each relate to one or both of these exemptions or grounds of defense, and hence it is unnecessary to notice them seriatim.

As to the first ground of defense, the learned president of the court below instructed the jury, *inter alia*, that voluntary exposure to unnecessary danger "means an intentional exposure to unnecessary danger"; and, unless the assured "did it intentionally, you cannot find that he exposed himself to danger, within the terms of this exception. . . . It is very difficult, and, in fact, it is rarely the case that you can prove by positive evidence what a man's intentions were, and hence you must determine his intentions generally from his acts and conduct; and, it may be said that if a man acts so recklessly and carelessly that he shows an utter disregard of a known danger, then he may be said to have exposed himself voluntarily to danger. Or, if the risk of danger is so obvious that a prudent man, exercising reasonable foresight, would not have done the act, then he may be said to have voluntarily exposed his person to danger. It must also be exposure to unnecessary danger."

This excerpt from the charge is the subject of specific complaint in the first assignment of error, and is involved in some of the others. It fairly represents the learned judge's construction of the clause first above quoted, and is substantially correct, because it is in harmony with the ruling of this court, on the same clause, in *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205. In that case, Mr. Chief Justice Mercur, referring to the assured, said: "It is true, he voluntarily left the car; but ¹¹ a clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto, without any knowledge of the danger, does not constitute a voluntary exposure to it. . . . The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental."

The construction put upon the exempting clause in question by the court below is also in substantial accord with that given to similar phrases in other well-considered cases, among which are *Manufacturers' etc. Co. v. Dorgan*, 58 Fed. Rep. 945; *Schneider v. Provident Life Ins. Co.*, 24 Wis. 28; 1 Am. Rep. 157; *Providence Life Ins. Co. v. Martin*, 32 Md. 310; *Equitable etc.*

Ins. Co. v. Osborn, 90 Ala. 201; Marx v. Travelers' Ins. Co., 39 Fed. Rep. 321; Pacific Mut. Life Ins. Co. v. Snowden, 58 Fed. Rep. 343. But aside from rulings in similar cases, our own construction of the same clause in Burkhard v. Travelers' Ins. Co., 102 Pa. St. 262, 48 Am. Rep. 205, ought to be conclusive.

As to the instructions relating to the second ground of defense, including the learned judge's answers to defendant's points for charge, we think they are also substantially correct and adequate. There is nothing in either of them that requires elaboration. The testimony tends to show that the death of the assured was the result of an accident that was fairly within the terms of the policy as properly construed by the court. The case was fairly submitted to the jury, and, in the light of all the testimony, their verdict was fully warranted.

Judgment affirmed.

INSURANCE—ACCIDENT.—Death by voluntary exposure to unnecessary danger, hazard, or perilous adventure, within the meaning of the usual exemption clause in policies of insurance against accident, is where the insured intentionally does some unnecessary act which reasonable and ordinary prudence would pronounce dangerous, and his death occurs in consequence thereof. If the danger was obvious, the exposure to it voluntary and unnecessary, and the death of the insured ensued in consequence, the case may fairly be held to be within the exception in the policy: *Extended note to Travelers' Ins. Co. v. Jones*, 12 Am. St. Rep. 272, 274.

INSURANCE—ACCIDENT—ROADBED.—A space between railroad tracks constituting a well-beaten, level, and smooth walk is not a part of the roadbed, within the meaning of an accident insurance policy not insuring against accidents "on a railroad bridge, trestle, or roadbed": *Meadows v. Pacific etc. Ins. Co.*, 129 Mo. 76; ante, p. 427.

ACCIDENT INSURANCE.—EVIDENCE OF CAUSE OF DEATH is the subject of the monographic note to *Meadows v. Pacific etc. Ins. Co.*, ante, p. 441.

CLARK v. PHILADELPHIA.

[171 PENNSYLVANIA STATE, 80.]

EMINENT DOMAIN.—THE DAMAGES RECOVERABLE FOR THE OPENING OF A STREET, where they constitute an indivisible claim, include all elements of damage already existing, but do not include rights of action which are yet inchoate, or damages which may not follow from such opening.

THE DAMAGES RECOVERABLE BY A PROPERTY OWNER FOR THE GRADING OF A STREET in front of, or running through, his property are not part of the damages recoverable for the opening of the street. Therefore, if the grading occurs as a separate act, so long after the opening of the street that the assessment of damages at the time of the appropriation could not have included those resulting from the grading, the latter may be ascertained and recovered in a second action or proceeding.

THE RIGHT TO RECOVER DAMAGES FOR THE GRADING OF A STREET IS NOT WAIVED by disclaiming all damages for the opening of such street, because the right to damages for the change of grade does not accrue until the actual change is made on the ground.

Joseph S. Clark and John G. Johnson, for the appellant.

E. Spencer Miller, assistant city solicitor, and Charles F. Warwick, city solicitor, for the appellee.

²⁴ MITCHELL, J. Appellant's amended statement is a petition under the act of May 16, 1891 (Pub. Laws, 75), for the appointment of viewers to assess damages for a change of grade of Forty-fifth street. The city of Philadelphia set up in its answer that, in a prior proceeding in the quarter sessions for the opening of said Forty-fifth street, the petitioner had expressly waived his claim for damages for his land taken by the opening, and, therefore, was now barred from his present claim. The court below sustained this view by discharging the rule for the appointment of viewers.

The waiver must be either by estoppel or by intention.

1. The claim of a property owner against the city for the opening of a street is a single claim for the depreciation in the value of his land, though it may include various elements such as the value of the part actually taken, and the injury to what is left, whether the latter is by reason of diminished size, inconvenient shape, difference of grade, or other attendant circumstances. It was accordingly held in *Pusey v. Allegheny*, 98 Pa. St. 522, and other cases that have followed it, including *Righter v. Philadelphia*, 161 Pa. St. 73, that the claim must be asserted as an entirety in the same proceeding, and, if any part of it be omitted, the owner will be estopped from setting it up in a subsequent action. To this rule, however, there is the necessary limitation that the claim need only include elements already existing. No proceeding can be required to include rights of action which are yet inchoate. Where, therefore, "the grading occurs as a separate act of the public authorities, and so long after the opening of the street that the assessment of damages ²⁵ at the time of the appropriation cannot include those resulting from the grading, the latter may be ascertained by a second view": *Pusey v. Allegheny*, 98 Pa. St. 522.

The present case comes within the exact terms of the exception. The report of the viewers to open Forty-fifth street was confirmed, and the decree thereon made, June 25, 1887. The ordinance under which the grading of the street was done was not passed until March 10, 1888. The right to damages for

change of grade does not accrue until the actual change is made on the ground: *Ogden v. Philadelphia*, 143 Pa. St. 430. When, therefore, the appellant, in the proceeding in the quarter sessions to open the street, disclaimed "any damage for the property taken by the opening of said street," there was no necessary legal implication that he thereby waived a claim for damages by change of grade which was as yet inchoate, and for which no right of action yet existed. There was, therefore, no estoppel, by virtue of such disclaimer, against the assertion of the other right when it should arise. The opening and grading were separate acts, one through the operation of the court of quarter sessions, and the other through an ordinance of council, and the latter was, in the language of *Pusey v. Allegheny*, 98 Pa. St. 522, already quoted, so long after the former that "the assessment of damages at the time of the appropriation cannot include those resulting from the grading."

The argument of the appellee, that by this construction the advantage to the city of having the complete damage assessed in a single proceeding will be lost, and that property owners may, by dedication in advance, or by proceedings in the quarter sessions, secure an opening without the risk of assessment for benefits, would be a good argument *ad inconvenientem* addressed to the law-making power, but even then there is another horn to the dilemma, which is, that the assessment of damages for a change of grade not yet actually made is speculative, as it is compensating the owner in advance for an injury not yet done to him, and which, in fact, may never be done. This is the view that was successfully urged by the city of Philadelphia in *In re Plan 166*, 143 Pa. St. 414, and the rule was there settled that no damages are recoverable for change of grade until the actual work on the ground is begun. By this rule, as was there said, "The city is not exposed to the danger of speculative damages ³⁶ for a change that may never be made in fact, while the property owner will still be compensated, but for an actual change when it is made on the land." The subject has inherent difficulties, because no general rule can be formulated which will invariably work justice to all parties. But the vigilance of the city officers can, in most cases, protect the city's interest by seeing that dedications of land, or waivers of damages for opening, are not accepted, unless they include waiver of damages as to grade, and that ordinances for opening shall also provide for grading, so that the acts shall be concurrent, and claims for both be necessarily presented in the same proceeding. It may also be worth while for the law-making authorities to consider whether

the jurisdiction of the quarter sessions over the opening of streets, at least in cities of the first class, where damages are so important a part of the expenses of government, should not be limited or taken away, if it may constitutionally be done, and the whole subject left exclusively to the city councils where it properly belongs. The authority is not in its nature judicial, but legislative, and its survival in the quarter sessions is a remnant of the colonial days, when that tribunal, before the accurate definition and separation of constitutional powers, exercised a general and very miscellaneous jurisdiction over the great body of local affairs. That the jurisdiction in the rural parts of the state where roads are matters of general concern, and the land damages for opening are relatively small, is still beneficial, and the public interest is watched and subserved, is probably unquestionable, but it is patent to everyone who has presided in the quarter sessions of Philadelphia during the past twenty years that the opening of streets by proceedings under the road laws is always at the instance, and for the benefit, of private enterprise, and the public necessity or convenience alleged as a basis is, like the right of eminent domain under the corporation laws, the thinnest kind of a mask for individual profit.

2. The waiver of appellant's claim to damages may extend to and include damages resulting from the opening at the grade on the city plan, if such was, in fact, the intention of the waiver at the time, and it is argued for the city that such must have been the intention, as the appellant must have known that when the street was opened it would be at the established grade. We do not, however, think this result follows; certainly ³⁷ there is no sufficient evidence of it in the appellant's petition and the city's answer, which are all the court had before it. The waiver, as it is set out in the viewers' report, is of damages for "property taken by the opening," and, as we have seen, the municipal acts of opening and grading were not contemporaneous, but the first was ended by a final decree of court more than eight months before the latter was authorized by ordinance. The damages for change of grade are not within the letter of the waiver, nor do the circumstances show that they were within the intent. But this is not all. It appears in the appellant's statement that, at the very time when this waiver was made in the proceeding to open, he had a separate proceeding of his own pending in the same court, for the assessment of his damages by the change of grade. It is true that it was subsequently held that he had no right of action for the paper change, and, therefore, the proceeding was not only premature, but in the

wrong court: *In re Plan 166*, 143 Pa. St. 414. But the fact that appellant then had such an action pending, which he was pursuing for the assessment of these very damages, and which was not abandoned nor even referred to, is conclusive that the waiver was not intended to cover anything more than its literal terms included—the damages for property taken in the opening.

There was no waiver, therefore, either by estoppel or by intention, of the damages claimed in this proceeding, and the appellant was entitled to have viewers appointed and the case proceed regularly according to the statute.

This result is not in conflict, as is argued, with the decision in *Righter v. Philadelphia*, 161 Pa. St. 73. In that case, the opening and grading were done at the same time, and the ground of the decision, as stated by our brother Fell, is, that as an action must have included both elements of damage, the waiver must be presumed to have been intended to include both. "If no dedication had been made, and the city had done precisely what it did—opened and graded the street at the same time—the plaintiff's action for the opening would have included his damages for the grading. . . . The question is one of intention, to be gathered from the deed, with the aid of the circumstances surrounding the parties." And the most potent factor among such circumstances is the opening and grading at the same ³⁹ time, in which respect the case differs from the present. That was an illustration of the rule laid down in *Pusey v. Allegheny*, 98 Pa. St. 522; this is an example of the exception.

Judgment reversed and procedendo awarded.

EMINENT DOMAIN—CONSEQUENTIAL DAMAGE FOR IMPROVEMENT OF STREET.—Consequential damages involved in the lawful improvement of a street for street purposes are merely the consequence of a legal act, and not a taking of property. They cannot form the basis for a recovery in the courts nor of a lawful claim for compensation: *Selden v. Jacksonville*, 28 Fla. 558; 29 Am. St. Rep. 278, and note. A city is not liable for consequential damages caused by the grading of its streets, unless the work is negligently performed: *Davis v. Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 861, and note with the cases collected.

WILKES-BARRE v. ROCKAFELLOW.

[171 PENNSYLVANIA STATE, 177.]

OFFICIAL BONDS—THE LIABILITY OF BOTH PRINCIPAL AND SURETIES on an official bond must be measured by the terms of the instrument. These must receive a reasonable construction, and this requires that they shall not be extended so as to cover any violation except of official duties. Therefore, sureties are not answerable for extra-official acts or undertakings of their principal.

IF A CITY TREASURER BECOMES A BORROWER OF THE MONEYS INTRUSTED TO HIS CARE, by the loan to him thereof by the sanction of the proper municipal authorities, the sureties on his official bonds are not answerable for the repayment thereof, for the reason that it is not an official duty arising from his being treasurer, but merely an obligation resulting from his having become a debtor of the municipality. Nor need the sureties prove that the action of the municipal authorities was regular, or that all the steps which ought to have been taken before making the loan were taken. It is sufficient that, without the knowledge of the sureties, their principal had been turned from a mere custodian of public moneys into a borrower of them by the action of the municipal officers, and the money subjected to all the risks of loss incident to its being mingled with the funds of the borrower, and used in his private business.

IF A CITY TREASURER BECOMES A BORROWER OF THE FUNDS in his official custody, and pays interest to himself as such officer, the sureties on his official bond are answerable for such interest, if he afterward misappropriates it, or it is by any other cause lost or not properly accounted for.

THE SURETIES OF A CITY TREASURER ARE NOT ANSWERABLE FOR INTEREST on a balance in his hands in favor of the municipality, and upon which he agreed to pay interest. Such an agreement is against public policy.

ENTRIES ON PUBLIC BOOKS—BONDS.—While the entries made by a city treasurer in his books are prima facie evidence against his sureties, they should be permitted to prove that the items, or some of them, have been erroneously entered, that their principal was mistaken in his view of his own liability, or was disposed, unfairly, to make them responsible for sums of money for which no recovery could otherwise be had against them.

S. J. Strauss, W. H. Palmer, F. W. Wheaton, and G. R. Bedford, for the appellants.

Alexander Farnham, John McGahren, and William S. McLean, for the appellee.

187 WILLIAMS, J. This is an action upon an official bond. The principal obligor allowed judgment to go by default. The sureties made defense, and raised on the trial some questions that, so far as we have been able to discover, have not been passed upon in the form in which they now appear. It seems that F. V. Rockafellow was elected treasurer of the city of Wilkes-Barre for twenty-one years consecutively. His last election took place in April, 1892, and he gave the bond now sued on soon after. During all this time he was a banker, in good financial

standing, doing business in Wilkes-Barre. In February, 1893, his bank suddenly closed its doors. Its liabilities proved to be large and its assets practically nothing. He made a general assignment for the benefit of his creditors, but his assigned estate realized less than seven per cent on his liabilities. His indebtedness to the city as treasurer was ascertained to be fifty-one thousand seven hundred and forty-three dollars and one cent. It was made up of four items, viz., the sinking fund of the city, and between four thousand and five thousand dollars of interest thereon, the ordinary or current funds of the city, and a considerable sum allowed as interest on the balance due upon this account.

The position of the sureties is, that their undertaking is to be responsible for their principal as an officer, and not as a banker or borrower; the condition of the official bond being, that their principal, "treasurer of said city of Wilkes-Barre, shall faithfully discharge the duties of his said office, and pay over and safely deliver into the hands of his successor all moneys, books, accounts, papers, and other things" belonging to the city which he shall hold as such officer. They allege that he held no part of the fifty-one thousand seven hundred and forty-three dollars and one cent, found due from him when his bank closed its doors, as a city treasurer, but as a borrower, and that the city has, for that reason, no claim upon them for any part of its loss. The position of the city, on the other hand, is, that the entire amount demanded belonged to the city, and was in the hands of the city treasurer as its lawful custodian. The assignments of error all relate to some phase of this general controversy, and will be sufficiently considered by determining the relation of F. V. Rockafellow to the four items into which the plaintiff's demand is divisible. The general rule is, that the liability of both principal and sureties in an official bond must be measured by the terms of the instrument. The terms must receive a reasonable construction, and, if there has been no violation of official duty, there has been no breach of the condition for which the sureties can be required to account. It follows necessarily that for an extra official act or undertaking of the principal the sureties cannot be held responsible: 2 Am. & Eng. Ency. of Law, 467 b. And if the ordinary course of official action is departed from for the benefit, and at the instance, of the party to whom the bond is given, and loss results, the sureties are not, in law or morals, responsible for such loss, unless they assented to the departure from the ordinary course of official

action which made the loss possible: *Rogers v. Marshal*, 1 Wall. 644; *Skinner v. Wilson*, 61 Miss. 90. What was the official duty of the city treasurer? Simply to act as custodian of the funds belonging to the city. As to the sinking fund, it is clear that he had no power to invest it or use it in any manner, except under the direction of the sinking fund commissioners. They had power under the ordinance to invest the funds under their control, subject to the approval of the council, and it was made their duty to report annually the condition of the sinking fund and its securities to the council. The eleventh section of the same ordinance provides that "the treasurer of the city shall be the custodian of the moneys and securities of the sinking fund, subject to the inspection and order ¹⁸⁹ of said commissioners." As the commissioners had power to invest the sinking fund in such securities as the council should approve, they had, of course, power to lend it to the person who had the custody of it as an officer. When they did this, the money was no longer in the treasury, but the security taken for its return stood in its place.

The treasurer as such held the security. The individual borrower held the money, not as an officer, but as a debtor to the city. The sureties would, in that case, be liable for the care of the security held by their principal or city treasurer. They would not be liable for the payment of the money borrowed by him from the sinking fund commissioners, because that was a personal debt, for the collection of which the creditors would be compelled to look, as in the case of any other loan, to the solvency of the borrower, and the securities given at the time the loan was made. When asked to pay the personal debts of their principal, the sureties may well reply, it was the official conduct, not the personal solvency, of the treasurer for which we engaged to be responsible. If he has been guilty of a breach of official duty, for that we are liable as sureties upon his official bond, but we have no concern with his personal debts. Now, the defendants offer to prove at the trial that Rockafellow borrowed the money in the sinking fund from the sinking fund commissioners at four per cent per annum; that he held it under this arrangement for eight years before the bond sued on was given, and paid the interest regularly at the rate agreed upon. They also offer to prove, in connection with this offer, that each year the commissioners reported the receipt of the interest from him to the city council, and their reports were approved. The learned judge rejected this offer, for the reason that it did not undertake to set forth "what action was taken, either by the coun-

cil or the sinking fund commissioners, before the loaning of the money." But if the fact was as alleged, that without the knowledge of the sureties, their principal had been turned from a mere custodian of public moneys into a borrower of them by the action of the municipal officers, and the money subjected to all the risks of loss incident to its being mingled with the funds of the borrower, and used in his private business, the sureties had a right to show it; and, if they did show it, then, on the commonest principles of justice, ¹⁹⁰ they had a right to defend as to so much of the plaintiff's claim. What difference could it make to the sureties whether the proceedings were strictly formal, so long as they resulted in the loss of the money, and were taken by those who had a right to invest it. Suppose the loan had been made to some other person, upon whose failure it was lost, and that in the treasury there was found the borrower's note taken by the commissioners. Would the sureties, if sued, be compelled to show that every step taken by the sinking fund commissioners had been regularly entered on their records, and had been in exact compliance with the law, before they could set up the fact that the money had been taken out of the treasury by those who had the right to invest it? Unless there was some breach of official duty on the part of the treasurer in parting with the money, neither he nor his sureties could be held for its loss because the commissioners had made a bad loan. If they had the power to make the loan, and did make it, they took the money out of the treasury for investment, and the treasurer no longer held it as the custodian. This offer should have been received. Whether the evidence would have supported it, we cannot determine, but the defendants had a right to make the showing offered, if it was in their power. It was, in effect, an offer to show that the sinking fund had been invested, and had not been in the treasury, for more than eight years. The sinking fund commissioners might be liable to the city for a loss resulting from their neglect of duty, but the defendants are not their sureties, and have no concern with that question.

The interest on the sinking fund stands on quite different ground. If Rockafellow, as a banker, had borrowed of the sinking fund commissioners the money which Rockafellow, as city treasurer, had in his custody, and had paid interest on it regularly, as alleged, for eight years, the interest, having been paid by him as borrower to himself as city treasurer, was, as to himself and his sureties, in the treasury. For this he was liable to account. His failure to pay it over to his successor was a breach of his offi-

cial duty, and for such breach of official duty his sureties were liable on their bond. They were liable, not because it was interest due from him to the city, but because it was interest received by him as city treasurer from a borrower from the sinking fund commissioners. It was income ¹⁹¹ derived by the commissioners from an investment of the sinking fund money, paid to the treasurer as the proper receiving officer and custodian of all uninvested money belonging to the city. If the money was not, in fact, lent to Rockafellow, then he was not liable to interest, for, as city treasurer, his duty was to hold the money subject to the orders of the proper officers, and he had no right to use it. His duty was simply to pay over, when legally required so to do, what he had received by virtue of his office, and for the discharge of his official duty his sureties were liable. When this duty was discharged, their liability was at an end. Either he held the sinking fund as treasurer, or he had borrowed it as a banker. The rejected evidence, if it had sustained the offer, would have settled this question and the extent of the liability of the defendants as to this part of the plaintiff's claim.

The remaining question relates to the general funds of the city, and the effect of the agreement by Rockafellow to pay interest at the rate of three per cent on balances in favor of the city. It does not appear that there was, as to this money, any agreement entered into. Some member of the city council, in naming another candidate, stated that the person named by him would, if elected city treasurer, pay interest at the rate of three per cent on the balance in favor of the city. Another member said, if Mr. Rockafellow was re-elected, he would do as well by the city as anyone else. The election then took place, and resulted in the choice of Mr. Rockafellow by a decided majority. The relation of borrower and lender was not created by these statements. It does not seem to have been contemplated. The balance would be constantly shifting in amount. The treasurer was to be prepared at all times to honor the warrants of the proper officers. And upon the surplus of receipts over disbursements, as balances were struck from time to time, interest was to be allowed. This agreement, if made, did not amount to a loan of any particular sum of money by the city council to the treasurer, but was in the nature of a premium demanded from him as the price of the office. It was a premium for which he was not liable, which he could not be compelled to pay if he had taken defense to it, and for which the sureties are not liable.

The agreement, if made, was against public policy, and is ¹⁹²

incapable of enforcement. If, as we incline to think, he was not a borrower of the money of the city, but was to hold the money subject at all times to the call of the proper municipal officers, his duty, and his sureties undertaking on his behalf are discharged by the payment of the amount of money that came into his hands as treasurer, regardless of any promise to pay interest, or a premium in any other form, for the privilege of holding the office. The promise to pay interest as the price of an election to the office of treasurer has no valid consideration to support it. It is a promise that we cannot recognize as binding on him who made it; a fortiori is it without binding effect on the sureties upon an official bond. It is contended that as the law requires the city treasurer to keep accounts of his receipts and disbursements of the revenues of the city, and to make, at stated intervals, transcripts of these accounts for the information of the municipal government, the transcripts so made should be held to be conclusive upon him and his sureties as to the amount of public moneys received by him. This is putting the effect of the entries by the treasurer upon his books too strongly. They should be held to make a case, *prima facie*, against him and those who are in privity with him. They cannot, however, preclude the defendants from showing that the items, or some of them, have been erroneously entered; that their principal was mistaken in his view of his own liability, or was disposed, unfairly, to make them responsible for sums of money for which no recovery could otherwise be had against them. Their liability is limited, as we have seen, by the terms of the bond to a breach of official duty. If it was not the duty of the treasurer to pay, as such, the price demanded from him as the consideration of his appointment, his failure to pay it was not a breach of official duty, and, therefore, not a breach of his official bond. By the simple device of charging himself with that for which he was not liable, he could not shut the mouths of his sureties, or estop them from alleging the truth in their own behalf. The interest, whether it be treated as an exaction the law does not authorize, or the price demanded for the office, must be struck out, so far as it relates to the general funds of the city. So far as the facts now appear, we see no reason why the sureties should not be held liable for the general funds of the city. This disposes of the questions raised ¹⁹³ on this record. The assignments of error are sustained, so far as they relate to the questions now considered, the judgment is reversed, and a writ of *venire facias de novo* awarded.

Mitchell, J., dissents from so much of this opinion as holds

that plaintiff cannot recover interest on balances of general account.

OFFICIAL BONDS—CONSTRUCTION OF LIABILITY OF SURETIES ON.—To render sureties liable on an official bond, there must be a breach of some duty enjoined upon the officer, as such, by law. The sureties are liable only where the act or default complained of is a breach of some duty specifically described in the bond: *Extended note to Commonwealth v. Cole*, 46 Am. Dec. 509.

DURKIN v. KINGSTON COAL COMPANY.

[171 PENNSYLVANIA STATE, 193.]

CONSTITUTIONAL LAW.—A STATUTE REQUIRING OWNERS OF MINES to employ no foremen except those which had been examined by a board created by the act and furnished a certificate of their competency, and providing that such foremen shall perform their duties in the manner prescribed in the act, and that if any injury result to person or property from a mining foreman not discharging his duties, the mineowner should be answerable therefor, is unconstitutional and void. Such foremen must, under the provisions of this statute, be deemed agents or officers of the state, for whose negligence or incompetency a mineowner cannot be made answerable.

MINEOWNERS—FELLOW-SERVANTS.—A MINING FOREMAN is a fellow-servant of the other employes of the same master, employed in a common business, and he cannot be made liable to them for the negligence of such foreman, if he was a competent man to direct the operations of the mine, and if he was further subject to examination by a board appointed by law, which issued to him a certificate of competency, and his duties were also prescribed by statute; such statute cannot impose upon his employer liability for his negligence or incompetency resulting in injuries to his fellow-servants.

A MINING FOREMAN IS LIABLE to his fellow employes for injuries received by the latter from the negligence or incompetency of the former.

A STATUTE MAY BE PARTLY UNCONSTITUTIONAL WITHOUT BEING WHOLLY VOID. Thus the statute of Pennsylvania relating to anthracite coal mining, though unconstitutional in so far as it attempts to impose liability on mineowners for the negligence or incompetency of foremen whom they are obliged to employ, and whose duties are prescribed by such statute, may be treated as valid, in so far as it defines what shall be regarded as such mines.

H. W. Palmer, Samuel Dickson, and William C. Price, for the appellants.

John T. Lenahan and Edward A. Lynch, for the appellee.

199 WILLIAMS, J. The first article of the constitution of this state, known as the bill of rights, declares that all men are possessed of certain inherent and inalienable rights. One of these is the right to acquire, possess, and protect property. The preservation of this right requires both that every man should

be answerable for his own acts and engagements, and that no man should be required to answer for the acts and engagements of strangers over whom he has no control. A statute that should impose such a liability, or that should take the property of one person and give it to another, or to the public, without making just compensation therefor, would violate the bill of rights, and would be, for that reason, unconstitutional and void: *Harvey v. Thomas*, 10 Watts, 66; 36 Am. Dec. 141; *Ervine's Appeal*, 16 Pa. St. 265; 55 Am. Dec. 499; *Kneass' Appeal*, 31 Pa. St. 87; *Wolford v. Morgenthal*, 91 Pa. St. 30; *Godcharles v. Wigeman*, 113 Pa. St. 431. It is in furtherance of the right to acquire, possess, and protect property that section 18 of the bill of rights prohibits the enactment of laws that shall interfere with or impair the obligation of contracts. The tendency toward class legislation for the protection of particular sorts of labor has been so strong, however, that several statutes have recently been passed that could not be sustained under the provisions of the bill of rights. Such was the case in *Godcharles v. Wigeman*, 113 Pa. St. 431. Such was the case with some recent provisions relating to mechanics' liens, and such is alleged by the appellant to be the case with some of the provisions of the act of 1891 (Pub. Laws, 176), under which this action was brought.

200 The title of the act of 1891 is, "An act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania, and for the protection and preservation of property connected therewith." It divides the anthracite region into eight districts, and provides for the appointment by the governor of a competent mine inspector in each district who shall have a general oversight of mining operations within his district. It creates an examining board for each district, with power to examine candidates and recommend such as they shall deem qualified for the position of mine foreman to the secretary of internal affairs. It is made the duty of this officer to issue certificates to those who apply therefor, and have been recommended by the board of examiners. Article 8, section 1, declares that no person "shall be permitted to act as mine foreman or assistant mine foreman of any coal mines or colliery" who has not been examined by the board of examiners, recommended to the secretary of internal affairs, and provided by that officer with a certificate. The employment of a certified mine foreman is made obligatory upon all mineowners and operators, and a failure to do so is punished by a fine of twenty dollars per day, which may be collected from the owner, the operator, or the

superintendent in charge of the mine. The duties of the mine foreman are prescribed by the act, and the owner or operator of the mines cannot interfere with them. He is especially to "visit and examine every working place in the mine, at least once every alternate day, while the men of such place are or should be at work, and direct that each and every working place is properly secured by props or timber, and that safety in all respects is assured, by directing that all loose coal or rock shall be pulled down or secured, and that no person shall be permitted to work in an unsafe place, unless it be for the purpose of making it secure."

The mine foreman is also required to examine, at least once every day, "all slopes, shafts, main roads, ways, signal apparatus, pulleys and timbering, and see that they are in safe and efficient working condition." After having thus most effectually taken the management of his mining operations out of his hands, and committed it to officers of its own creation, whose employment is made compulsory upon him, the statute in section 8 of article 17 imposes upon the mineowner a liability for the neglect ²⁰¹ or incompetency of the men whom he is compelled to employ in these words: "That for any injury to person or property occasioned by any violation of this act, or any failure to comply with its provisions, by any . . . mine foreman, a right of action shall accrue to the party injured, against said owner or operator, for any direct damages he may have sustained thereby; and, in case of loss of life by reason of such neglect or failure aforesaid, a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost for like recovery of damages for the injury they shall have sustained." This statute, regarded as a whole, is an extraordinary piece of legislation. Through it the lawmakers say to the mineowner: "You cannot be trusted to manage your own business. Left to yourself, you will not properly care for your own employés. We will determine what you shall do. In order to make it certain that our directions are obeyed, we will set a mine foreman over your mines, with authority to direct the manner in which your operations shall be conducted, and what precautions shall be taken for the safety of your employés. You shall take for this position a man whom we certify to as competent. You shall pay him his salary. What he orders done in your mines, you shall pay for. If, notwithstanding our certificate, he turns out to be incompetent or untrustworthy, you shall be responsible for his ignorance or negligence." Under the operation of this

statute, the mine foreman represents the commonwealth. The state insists on his employment by the mineowner, and, in the name of the police power, turns over to him the determination of all questions relating to the comfort and the security of the miners, and invests him with the power to compel compliance with his directions. Incredible as it may seem, obedience on the part of the mineowner does not protect him, but, if the mine foreman fails to do properly what the statute directs him to do, the mineowner is declared to be responsible for all the consequences of the incompetency of the representative of the state. This is a strong case of binding the consequences of the fault or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is civil responsibility without blame and for the fault of another. The same conclusion may be reached by another road. It has been long settled that a mining boss or foreman is a fellow-servant with ²⁰² the other employes of the same master engaged in a common business, and that the master is not liable for an injury caused by the negligence of such mining boss: *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Delaware etc. Canal Co. v. Carroll*, 89 Pa. St. 374; *Waddell v. Simoson*, 112 Pa. St. 567.

The duty of the mineowner is to employ competent bosses or foremen to direct his operations. When he does this, he discharges the full measure of his duties to his employes, and he is not liable for an injury arising from the negligence of the foreman: *Waddell v. Simoson*, 112 Pa. St. 567. A vice-principal is one to whom an employer delegates the performance of duties which the law imposes on him, and the employer is responsible, because the duty is his own. As to the acts of the workmen, and the manner in which they do their work, the duty of the employer is to employ persons who are reasonably competent to do the work assigned them, and, if he finds himself mistaken in regard to their competency, to discharge them when the mistake is discovered. But he is not responsible for the consequences of their negligence as these may affect each other: *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160. Now, the act of 1891 undertakes to reverse the settled law upon this subject, and declare that the employer shall be responsible for an injury to an employe resulting from the negligence of a fellow-workman. Prior to the act of 1891, the man whose negligence caused the injury was alone liable to respond in damages. He might not always have property out of which a judgment could be collected, but the plaintiff must, in any case, take his chances

of the solvency of the defendant against whom his cause of action lies. The act of 1891 undertakes to furnish a responsible defendant for the injured person to pursue. Passing over the head of the fellow-servant at whose hands the injury was received, it fastens on the owner of the property on which the accident happened, and declares him to be the guilty person on whose head the consequences of the accident shall fall. To see the true character of this legislation, we must keep both lines of objection in mind. We must remember that the injury complained of is due to the negligence of a fellow-workman, for which the master is responsible neither in law nor morals. We must also remember that this fellow-workman has been ²⁰³ designated by the state, his duties defined, and his powers conferred, by statute, and his employment made compulsory under heavy penalties by the same statute. Finally, we must remember that it is the negligence of this fellow-servant whose competency the state has certified, and whose employment the state has compelled, for which the employer is made liable. The state says: "He is competent. You must employ him. You shall surrender to his control the arrangements for the security of your employés." It then says in effect, "If we impose upon you by certifying to the competency of an incompetent man, or if the man to whom we commit the conduct of your mines neglects his duty, you shall pay for our mistake and for his negligence." We have no doubt that so much, at least, of section 8 of article 17 of the act of 1891 as imposes liability on the mineowner for the failure of the foreman to comply with the provisions of the act which compels his employment and defines his duties is unconstitutional and void.

This disposes of this appeal, so far as the Kingston Coal Company is concerned. But why should the certified mine foreman be relieved from the consequences of his negligence? The jury have found that the injury was due to his want of attention to his proper duties, and his liability is clear without regard to our mining laws. But the statute required him to examine the roads and ways in use in the mine each day. He knew the film of rock separating the upper from the lower working was but eight feet thick at best. He knew that the supports for this film were not in line with each other in the upper and lower workings. He knew that layers of the rock were falling off, that the thickness of the floor was reduced under the way on which the accident occurred to about five feet, and that not far away it had fallen down into the lower working; yet with

all this knowledge he did nothing, so far as we can learn, to increase the security of the way. Whether his conduct be considered with reference to the statute, or regardless of it, his failure to do what he must have known to be necessary was a neglect of duty such as should render him liable to his fellow-servant who has suffered from it. Some difficulty has been suggested growing out of the pleadings, but the declaration is not before us. We cannot determine, therefore, whether an amendment is necessary in order to sustain the judgment against him.

²⁰⁴ We are not prepared to hold the act of 1891 to be unconstitutional as a whole. It relates to all anthracite coal mines, and defines what shall be regarded as such mines. Coal may be taken out of the ground by farmowners for their own use, or it may be taken in such small quantities and for such local purposes as to make the application of the mining laws to the operations so conducted, not only unnecessary, but burdensome, to the extent of absolute prohibition. Such limited or incipient operations are not within the mischief to remedy which the mining laws were devised. They are ordinarily conducted for purposes of exploration, or for family supply, and ought not to be classed with operations conducted for the supply of the public. The business of coal mining, like that of insurance or banking, may be defined by the legislature. The definition found in the act of 1891 seems to us reasonable, to be within the fair limits of a legislative definition, and to exclude only such operations as are too small to make the general regulations provided by the act applicable to them. The ground on which we place our judgment is not, therefore, that the act is local, but that the provisions of it which we have considered are in violation of the bill of rights. The judgment against Kingston Coal Company is reversed, for reasons that are fatal to a recovery against it.

The judgment against William Jones is affirmed.

MASTER AND SERVANT—FOREMAN, WHETHER FELLOW-SERVANT OR VICE-PRINCIPAL.—A foreman may be, and ordinarily is, but a mere fellow-servant: *New Pittsburgh Coal etc. Co. v. Peterson*, 136 Ind. 398; 43 Am. St. Rep. 327, and note.

MASTER AND SERVANT—LIABILITY OF SERVANT TO FELLOW-SERVANT.—A servant is answerable to a fellow-servant injured by his negligence: *Hare v. McIntire*, 82 Me. 240; 17 Am. St. Rep. 476. See, also, the note to *Albro v. Joquith*, 64 Am. Dec. 58.

STATUTES VOID IN PART.—Although part of a statute is unconstitutional, the remainder is not to be declared unconstitutional also, if

the two parts are distinct and separable, so that the latter may stand, though the former is of no effect: *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361; 41 Am. St. Rep. 278, and note. To the same effect see *Singer Mfg. Co. v. Fleming*, 39 Neb. 679; 42 Am. St. Rep. 613.

**BALD EAGLE VALLEY RAILROAD COMPANY v. NIT-
TANY VALLEY RAILROAD COMPANY.**

[171 PENNSYLVANIA STATE, 284.]

A COVENANT MAY BE ENFORCED IN EQUITY, WHETHER IT RUNS WITH THE LAND OR NOT, where it appears that it was the intention of the parties that it should bind their successors in interest, as well as themselves.

COVENANTS, SUCCESSORS IN INTEREST, WHEN BOUND BY.—If a covenant, or agreement, has been made between two parties respecting their property, and the interest of one of them is afterward subjected to a judicial sale under a lien antedating such covenant, and the purchaser, after his purchase, recognizes and acts upon the agreement for a time, thus receiving benefit therefrom, this is an affirmation of the covenant, and though it relates to land, and the affirmation is by parol, it becomes binding upon such purchaser, and equity will require him to perform it.

RAILWAY, CONSIDERATION OF A CONTRACT TO GIVE BUSINESS TO.—If, in consideration that a railway corporation shall subscribe for a specified amount of the bonds of a mining corporation, the latter agrees that it will give to the railway corporation all the traffic to and from its ore land and furnaces, which traffic the railway corporation agrees to carry for fair and reasonable charges, such agreement, upon the part of the mining corporation, is supported by valuable and sufficient consideration.

RAILWAY CORPORATIONS, AGREEMENT TO GIVE EXCLUSIVE BUSINESS TO.—An agreement, upon a valuable consideration, that a mining corporation will give all traffic to and from its mines and furnaces to a railway corporation, is not against public policy, and may be enforced in equity, where the railway, on its part, agrees to carry such traffic for fair and reasonable charges, and, in the event of any disagreement as to what charges are reasonable, to submit that question to arbitration.

RAILWAY CORPORATIONS, SPECIFIC PERFORMANCE OF CONTRACT TO GIVE TRAFFIC TO.—Equity will compel the specific performance of a contract to give to a railway corporation all traffic to and from the mines and furnaces of a mining corporation, where the railway corporation, on its part, agrees by such contract to carry such traffic for fair and reasonable charges.

RAILWAY CORPORATIONS—AGREEMENT TO GIVE TRAFFIC TO, AND NOT TO AID COMPETING LINES.—An agreement between parties to a contract, one being a mining, and the other a railway, corporation, that the former will give the latter all its traffic, and will not aid or encourage in any manner in the construction of competitive lines of railway, will be enforced in equity so far as it relates to the traffic, but in other respects, neither the mining corporation, nor its stockholders or managers, will be denied the right to promote, or otherwise encourage, competing lines of railway.

John Blanchard and David W. Sellers, for the appellants.

C. M. Clement, Ellis L. Orvis, and Calvin M. Bower, for the appellees.

²⁹⁰ DEAN, J. On the 22d of March, 1887, the Valentine Ore Land Association (unincorporated), and William Stewart and Evan M. Blanchard, trustees of the Valentine Iron Company, had the legal title to, and possession of, a large body of iron ore lands, mining rights, and other property in Centre county, on which was a large iron smelting furnace, partly built; the Valentine Iron Company proposed to lease this furnace and manufacture pig iron; then, in conjunction with the Nittany Valley Railroad Company, the latter as yet only projected, to construct, equip, and operate a railroad on the lands from the ore mines to the furnace, and also from the furnace to a connection with the Lemont railroad, near the furnace. For the purpose of raising money, the Valentine Iron Company and the Valentine Land Association had executed a mortgage, dated August 2, 1886, ²⁹¹ upon all the lands, to the Fidelity Insurance, Trust, and Safe Deposit Company of Philadelphia, as trustee, to secure the payment of six hundred thousand dollars of first mortgage bonds, the bonds to be sold, and the proceeds used to promote the project. The Lemont Railroad Company, in aid of the enterprise, agreed to purchase at par seventy-five thousand dollars of the bonds; in consideration of this aid, the land association, the iron company and the Nittany Valley Railroad Company, agreed to give to the Lemont Railroad Company and the Bald Eagle Valley Railroad Company, connecting short lines of the Pennsylvania Railroad Company, and to the last-named company, the traffic to and from the ore lands, furnace, and railroad. The covenant in this particular was, that the covenantors "agree, for themselves, their successors, lessees, and assigns, in the nature of a covenant to run with the title of the lands held by them, that they will give all the traffic coming to or going from the property, mines, and furnaces owned and controlled, and to be built and operated, . . . by them," to the three railroad companies, so far as these lines were available for the covenantors' traffic, and so long as the railroad companies observed the agreement on their part. The land, iron, and railroad company further covenanted that, in making any grants of lands, they would provide in the grants that the grantees should take subject to the covenants, and that they would not aid or encourage, in any manner, in the construction of competitive lines of railroad in the territory.

The three railroad companies covenanted they would transport the traffic thus received at fair and reasonable rates, as compared with charges on like traffic under like circumstances

on other parts of their lines. It was further provided that if any dispute arose under the agreement, it should be referred to two disinterested persons as arbitrators, one to be chosen by each party to the agreement, and these thus chosen to select an umpire, if they could not agree.

The seventy-five thousand dollars was paid over for the bonds agreed to be taken by the Lemont company; other of the bonds, sufficient to put the furnace and ore mines in operation, were disposed of, and all parties, in observance of the agreement, conducted their business until October, 1890, when, default having been made on the interest on the bonds, the mortgage was foreclosed by the trustee, and on January 29, 1891, the sheriff sold the property ²⁹² to the trustee, which purchased on behalf of the bondholders, for one hundred and ninety-five thousand dollars, accepting the trustee's receipt as a lien creditor for the purchase money. Deed was accordingly acknowledged to the trustee. On February 26, 1891, by consent of the bondholders interested, the trustee, by deed, conveyed the property to the Valentine Iron Company, a corporation organized February 6, 1891; instead of the bonds, the former holders of them accepted proportionate amounts of six hundred and thirty-four thousand three hundred and fifty dollars in stock of the new company, issued in shares of the par value of fifty dollars. By this change the railroad companies, plaintiffs, became stockholders in the amount proportionate to their seventy-five thousand dollars purchase of bonds. The new company continued the same relations with the railroad companies from the date of its organization down to the winter of 1892-93.

On the 11th of May, 1889, the "Central Pennsylvania Railroad Company" was incorporated, to construct a railroad from Mill Hall in Clinton county to Unionville in Centre county, a distance of about twenty-five miles, located with a view to form a connection with the Nittany Valley railroad near Bellefonte, and the Beech Creek Railroad near Mill Hall. The last-named railroad is, in its terminals and connections, a competitor of the plaintiff railroad companies. The plaintiff averred that the Valentine Iron Company, since the beginning of the year 1893, had encouraged the construction of the Central Pennsylvania railroad financially and otherwise; J. W. Gephart, the president of the iron company, being also the president of the railroad company, is also acting as superintendent of the work of construction of the competing road, and is the chief representative of the undertaking; that the Nittany Valley railroad was leased in 1891 to the Valentine Iron Company, and is oper-

ated by the iron company. That the Valentine Iron Company threatens to give the traffic coming from and going to the mines and furnace for transportation over the Central Pennsylvania, and thence, by its connections, over the lines of competing roads.

The plaintiffs aver that the acts of defendants are in violation of their covenants in the agreement of March 22, 1887, and pray that they be restrained by injunction.

The defendants demurred to the bill: 1. Because, by the sale on the mortgage, they took the property free and discharged from all the covenants of the agreement, ²⁹³ the agreement having been executed subsequent to the mortgage; 2. The purchaser at the mortgage sale took the land discharged of the covenants; therefore every other party to the agreement was released; 3. That the agreement was without consideration, and is therefore void; 4. The agreement was against public policy; 5. It was in violation of article 17 of the constitution, and is not enforceable in law or equity; 6. That the Nittany Valley railroad did not covenant nor aid in the construction of competitive lines of railroad; 7. That the restraint of the construction of competitive lines, whether by moral support or otherwise, is illegal; 8. That to enjoin defendants from giving traffic to a common carrier, under the laws of the commonwealth, is in restraint of trade; 9. There is an adequate remedy at law.

The court below, after argument, sustained the first, second, fourth, fifth, and eighth grounds of demurrer, and entered a decree dismissing the bill, and from that decree plaintiff appeals, assigning sixteen errors to the decree and opinion of the court.

The bill sets out the facts in substance as we have stated them, and it follows from the demurrer that defendants admit them as averred.

The opinion of the learned judge of the court below is in good part devoted to demonstrating that the covenant to transport the traffic to and from the ore lands and furnace over plaintiffs' lines, and not to aid and encourage the construction of other or rival roads to the source of the traffic, is not a covenant real which runs with the land, binding upon the heir, successor, or assignee, but is a mere personal covenant, binding only upon the parties to it. Spencer's case, 1 Smith's Lead. Cas., 9th Am. ed., 174, with many of the cases cited in the notes to the leading case, and others which do not there appear, are relied on as authority for this holding. Spencer's case is taken from 5 Coke, 16, as reported by Coke, who says that, among other ques-

tions, it was decided "where the assignee shall be bound without naming him, and where not; and where he shall not be bound, although he be expressly ²⁹⁴ named, and where not." It then appears from the case that the second of the seven resolutions adopted by the court is: "If the lessee had covenanted for him and his assigns that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee; for, although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. . . . But, although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged."

This case, decided three hundred years ago, as with many of the cases of that time, bases its conclusions in the main on the results arrived at by the ratiocination of the judges. They assumed certain premises, and if from these a certain conclusion was reached, then the judgment was for plaintiff or defendant; as, for instance, in the first resolution, "When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, shall go with the land, and bind the assignee, although he is not bound by express words." Here the assignee is bound, although the covenantor hath not so said; then the same resolution goes on: "But when the covenant extends to a thing not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being." Here the covenant does not bind the assignee, although the covenantor hath so said. Resort was had to the instrument to ascertain the subject of the contract, and, when that was settled on, a contract was made by the judges for the parties, without much regard to what the parties said; they looked not for the expressed intention, with a view to giving it effect in the judgment, but adopted a conclusion, based often on an artificial or arbitrary rule of construction, and this conclusion molded the judgment; the intention was subordinated to the rule. As shown by the large number of cases, both in England and this country, cited by the able editors of the notes to Spencer's case, 1 Smith's Lead Cas., 9th Am. ed., 174, there has been more or less of a struggle by the courts, in the three centuries which have elapsed ²⁹⁵ since that decision was announced, to escape from its application; and very often, if the

rule defeated the manifest intent of the parties, some distinction was found or assumed which warranted a disregard of it; and, in some cases where the rule, if invoked, would plainly shut the door against equity, the door was closed against the rule. Like the arbitrary ancient rules in Shelley's case, in Twyne's case, and others, it has been given such flexibility by so many later decisions that, without overruling well-decided cases, it is impossible to rigidly apply it at this day, even in common-law actions. Whether, under our system of administering equity, if this were an action at law, Spencer's case, 1 Smith's Lead. Cas., 9th Am. ed., 174, would rule it on the facts, it is not important to decide. This is not an action at law, but a bill in equity, and the controlling element is the intention of the parties to the covenant; and so it is laid down by many of both the English and American decisions, some of them cited in the notes to Spencer's case, 1 Smith's Lead. Cas., 9th Am. ed., 174. In the note on page 198, English notes, it is said: "In Tulk v. Moxhay, 2 Phil. 774, it was laid down by Lord Cottenham that a covenant made by the purchaser of land, that he and his assignee would use, or abstain from using, the land in a particular way, may be enforced in equity against all purchasers, without reference to the question whether the covenant ran with the land." And it is remarked by the editor, that Keppell v. Bailey, 2 Mylne & K. 517, in the court of chancery, a case cited and relied on by the court below and appellees in this case, is overruled by Tulk v. Moxhay, 2 Phil. 774, and the latter case has been since followed and extended.

Take the facts as they are averred in the bill in equity, and as they are here admitted by the demurrer: 1. The complainants contributed seventy-five thousand dollars for the development of the ore land, and the construction of a furnace and railroad; 2. The furnace and railroad were constructed, were put in operation, and ore mines, from which was obtained ore to run the furnace, opened; 3. The property was sold on a mortgage antedating the agreement and seventy-five thousand dollars contribution about seven months; 4. Those who had the legal title and equity of redemption made the contract, by which they secured plaintiffs' money, and, in consideration therefor, covenanted for themselves, successors, and assigns, in the nature of a covenant to run with the lands, to give all traffic coming to or going from the ore lands ^{and} and furnace to plaintiffs' lines; 5. The Valentine Iron Company, the present assignee of the property from the sheriff's vendee, from January, 1891, for nearly two years, accepted all the benefits derivable from this contract, as shippers, and affirmed it; 6. Defendants refuse absolutely to per-

form the covenants entered into by their predecessors in title, although the very existence of the property occupied and enjoyed by them was created in part by the large contribution of defendants; 7. There is no adequate remedy at law for a persistent violation of such a covenant.

Should the facts as they thus appear move the conscience of a chancellor to afford relief to the injured party? We do not consider it important that, by the judicial sale and reorganization of those interested under a new charter, the nominal identity of the actual parties to the covenant and those now in possession has been changed. The averment of affirmance of the contract by the present defendants is admitted by the pleadings. That the affirmance of a traffic contract touching land rests in parol will not prevent the interposition of equitable principles, even where the contract postdated a lien through which the defendant claimed title.

In *Campbell v. Hand*, 49 Pa. St. 234, adjoining owners of land on opposite banks of a stream agreed to build and keep in repair a dam for the use of both; on a judgment against one of them, antedating the agreement, his interest was sold at sheriff's sale; the sheriff's vendee used the dam, as did the debtor in the judgment; the court below held the sheriff's vendee bound to contribute to the repairs, because he had, by the use of the dam, affirmed the agreement; this court, Thompson, J., says: "I will not undertake to say the contract created covenants running with the land, because the covenants could not undertake to impose a covenant or duty that might not be divested by a sale of the premises so encumbered by a prior judgment, a sale on which would carry back the title to a period coeval with the date of the lien. . . . Now, why should not the assent of the sheriff's vendee, and that of the remaining cotenant, be sufficient to continue the original covenants in their original efficiency? I do not think it is a sufficient negative of the inquiry to say the remedy on the covenants is not pursued."

²⁰⁷ What would have been the effect of a denial of any affirmance of this contract by the sheriff's vendee, or these defendants, we are not called upon to say; we decide the point on their admission of the affirmance of it.

Nor is the contract, as contended by appellees, and as held by the court below, without consideration; the preliminary statements to the stipulations show the value of the consideration. The land association and iron company, with the Nittany Valley Railroad Company, are about to construct the railroad from the

furnace to the mines on the land, and from the furnace to a connection with plaintiffs' lines; they are about to complete a furnace or furnaces partly built; for the purpose of securing funds, they have placed a mortgage to secure six hundred thousand dollars; they cannot carry out this project with a paper mortgage; they want the money which it is to secure; plaintiffs give them seventy-five thousand dollars, and agree to carry their products at reasonable rates; if any dispute arises about what is reasonable, they agree to the establishment of a tribunal to determine the dispute without resort to the courts. In consideration of this aid in the development of their property, defendants agree to give them their traffic. Without such development, the railroad to carry the ore from the mines to the furnace head, and from the casting-house to market, their property for present enjoyment is useless; by the stipulated aid, it is valuable. This is an ample consideration.

It is held by the court below, the contract is in violation of sections 1, 3, and 4 of article 17 of the constitution. The first section provides that all railroads, as common carriers, shall carry each other's traffic without discrimination. There is nothing in the agreement which contravenes this provision; the railroad company must carry such freight as a shipper offers it; if freight by the public be routed over its road to destination by way of the Central Pennsylvania railroad, it must so forward it; it is not averred in the bill that the contract is to the contrary.

Section 3 of the same article provides that all individuals shall have equal rights to transportation, without discrimination. The bill does not seek to deprive the iron company of the right here guaranteed. The right of every shipper is to make a contract with such common carrier as he chooses, to ~~2008~~ carry his goods to destination; if he make none expressly, the law implies one with the carrier who accepts his goods. But he cannot make contracts with two or more carriers to carry the same goods; if he do, as but one can carry, the others can invoke the law as a remedy for his violation of contract. If he contract with a railroad to lay its rails to his manufactory or furnace, and furnish him money to aid him in bringing the raw material to the furnace, and he, in consideration, promises to give the railroad the transportation of such manufactured product to market at reasonable rates, how is the shipper deprived of any right? He but exercises the right guaranteed by the constitution; he contracts for the carrying of his own product for shipment to market from his own manufactory with whom

he pleases; the constitution does not go farther, and guarantees him a right to violate his contract when he pleases.

How this contract offends against section 4, which prohibits the consolidation of parallel and competing roads, we do not understand, although this is one of the reasons given for declaring the contract void. The Nittany Valley railroad, whose traffic is sought by plaintiff, is not a parallel road, but a connecting road, prolonging the plaintiffs' reach into new territory; the Central Pennsylvania is parallel to plaintiffs' line; it has no contract, either for traffic or consolidation with plaintiffs. The right of one road to lease, make traffic contracts with, or consolidate with, connecting roads, not parallel or competing, has not for thirty-four years been doubted, that we know of; the act of April 23, 1861, expressly confers such right, and the constitution does not affect it, except to prohibit the consolidation and leasing of parallel and competing lines. The rights of connecting roads under that act have been recognized many times since the adoption of the constitution of 1874, and that contracts for through business, both freight and passenger, between connecting railroads and shipper, are not only not ultra vires, but, on the contrary, have for their basis sound business principles; and special contracts may be made with a special class of shippers to secure business: See *Fitchburg R. R. Co. v. Gage*, 12 Gray, 399; *Hersh v. Northern Cent. Ry. Co.*, 74 Pa. St. 181; *Munhall v. Pennsylvania R. R. Co.*, 92 Pa. St. 150; *Hoover v. Pennsylvania R. R. Co.*, 156 Pa. St. 220; 36 Am. St. Rep. 43. In this last case, the contract was with a manufacturing company for a special rate on coal used for manufacturing ²⁹⁰ purposes; the contract was made eight years before the suit, with a view to the building up and development of the plant. This court, in a most exhaustive opinion by our brother Green, in which nearly all the authorities on the subject are noticed, held that special contracts for a special rate with a manufactory for the transportation of fuel was not undue discrimination; that blast furnaces, iron mills, and rail factories are encouraged and built up in sparsely settled regions by the aid of such contracts. While the question of discrimination does not arise in this case, the same principle is involved. Is a contract by a railroad company with an iron company, in which the former contributes a large sum of money to the latter for development, and gives to it facilities for transportation, in consideration of which the iron company contracts to give it all its

traffic, ultra vires? It is not in restraint of trade, for its express purpose and necessary effect are to increase both trade and population; not a single traveler or shipper outside the contracting party is affected in his selection of a route; the contract binds none of them.

It is not seldom those who have reaped benefits from a contract such as this seek to escape its obligation by taking refuge in that assumed turpitude which, on grounds of public policy, avoids the contract; but here, and it is a gratification to us to say it, the parties to this contract violated no law, restrained not others from engaging in business, did nothing of evil example or detrimental to public morals; therefore, there is no public policy which, in the absence of express legislative enactment, makes void this contract; as there clearly is no adequate remedy at law for repeated or continued violations of the defendant's covenants, they ought to be enforced in equity to the extent equity will take cognizance of their violation.

While the covenant to ship over plaintiffs' lines, on the faith of which plaintiffs enlarged their facilities for shipment and paid their money, will be enforced, our decree will go no further. The Central Pennsylvania railroad is a corporation, under the laws of the commonwealth, authorized to construct a line of railroad between certain terminals; its manifest duty is to construct its road for the benefit of the general public; no citizen can be restrained from giving its construction moral and material aid; public policy demands that it shall fulfill the objects ³⁰⁰ of its being. Admit that the officers of defendant company are giving it moral aid and encouragement because its construction will make it possible for defendants to violate their contract for shipment; this, at most, shows disregard of a moral obligation, without an infraction of the legal one, the actual shipment; the latter, equity can control; the former, it will not, both on grounds of public policy, and because its process would, to a great extent, be ineffectual. We cannot prevent men wanting to violate their contracts, while we can prevent the overt acts which constitute the breach; equity can enforce a tangible, substantial right of property under a contract, but it cannot make men good, and it is a very rare case in which it even tries to. With these defendants, however, who have pleaded, the case is different; we can restrain them from a flagrant violation of an essential covenant of their contract. The Nittany Valley Railroad Company and the Valentine Iron

Company affirmed the original contract which, in fact, gave them a business existence; they are bound to give their traffic to plaintiffs; this much of the contract is within the grasp of equity. Therefore, the decree of the court below sustaining the demurrer is reversed and set aside at costs of appellees, and it is adjudged and decreed that an injunction issue directed to the Nittany Valley Railroad Company and the Valentine Iron Company, their and each of their officers, agents, and employes, including the said J. W. Gephart, president of the Valentine Iron Company, restraining them from giving any traffic coming from or going to points upon the railroad of the said Nittany Valley Railroad Company, or coming to or going from the mines and furnaces of the said Valentine Iron Company, that may be owned or controlled by the said company, and originating upon said lands mentioned and described in agreement of the 22d of March, 1887, to the said Central Pennsylvania Railroad Company, or to any company or persons other than to the said plaintiffs. It is further ordered that the said contract be specifically performed in this respect; they, the said Nittany Valley Railroad Company and the said Valentine Iron Company are hereby ordered and directed to give all traffic coming from or going to points upon said railroad, or coming to or going from the property, mines, and furnaces of the said iron company, in so far as said traffic originates with, ³⁰¹ or is controlled by, them, the said companies, to them, the said plaintiffs, their successors or assigns. It is further ordered, this record and decree be remitted to the court below, that our order and decree may be carried into effect.

COVENANTS—ENFORCEMENT OF.—Specific performance of a personal covenant will be decreed, if it is of such a character and purpose that its performance was what was contemplated by the parties, and not mere damages for its breach: *Lewis v. Gollner*, 129 N. Y. 227; 26 Am. St. Rep. 516, and note. A covenant by an owner of land, to use or abstain from using it in such a manner as the other party to the contract specifies, will be enforced in equity against the grantees of the original contractors: *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816. If a covenant of reservation is one which the parties have the right to make, the original covenantee will be entitled to the aid of a court of equity to restrain its violation as long as he likes and remains the owner of the property, although it may be a covenant personal to him, and not running with the land: Extended note to *Ladd v. Boston*, 21 Am. St. Rep. 485.

COVENANTS—SUCCESSORS IN INTEREST—WHEN BOUND BY. When land is sold subject to a restrictive covenant, and the language of the deed, and the situation of the land with reference to other land of the grantor retained, are such as to make it clear that the restriction in the deed upon the use of the land sold was intended for the benefit of

the land retained, this is held to create a negative easement, such as binds all the successors in title of the land subject to the easement, provided they have notice thereof, express or constructive: *Extended note to Ladd v. Boston*, 21 Am. St. Rep. 486.

RAILROADS—DISCRIMINATION.—Under a statute prohibiting unreasonable preference or advantage, a railroad corporation may lawfully enter into a contract for the carriage of goods for a particular individual or corporation at a lower rate in respect to large quantities of goods, and for longer distances than one who sends them small quantities or short distances: *Hoover v. Pennsylvania R. R.*, 156 Pa. St. 220; 36 Am. St. Rep. 43, and note. A carrier may give reduced rates to customers agreeing to give it all their business, and refuse those rates to others who are not able or willing to so agree, provided the charges exacted from those not joining in the agreement are not excessive or unreasonable: *Lough v. Outerbridge*, 143 N. Y. 271; 42 Am. St. Rep. 712, and note.

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CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

CARNEAL v. LYNCH.

[91 VIRGINIA, 114.]

PARTITION.—A LIFE TENANT OF ONE MOIETY OF LAND can maintain a suit for partition against the remaindermen of that moiety, whether in esse or not, and the owners in fee simple of the other moiety.

JUDICIAL SALE—OBJECTIONS TO TITLE.—Though the property sold has a frontage somewhat less than that stated in the notice of sale, the purchaser will not be released from his bid on that account, if there was a plat referred to in such notice as being in the commissioner's office, which showed distinctly the true frontage. If he saw this plat, he would not be relieved on proving that he did not examine it.

NOTICE.—MEANS OF KNOWLEDGE, with the duty of using them, are, in equity, equivalent to notice.

Suit in partition. The clause of the will referred to in the opinion of the court is as follows: "Sixth. I give to my two grandchildren, Wm. M. Lynch and Charles G. Lynch, children of my daughter, Martha R. Lynch, deceased, the house and lot situated at the corner of Grace and Jefferson streets, in the city of Richmond, Va., to be held by them for their joint and equal benefit during their lives, and, at the death of either of them, the share of the one so dying to pass to his issue, according to the statute of descents. Should either of my grandsons, Wm. M. and Charles G. Lynch, die without issue, the share of the one so dying to go to the surviving brother, or his issue, if any; shall both die without issue, the property named in this clause to pass to their sister, Mollie A. Lynch, or her issue, if any."

James Lewis Anderson, for the appellant.

Courtney & Patterson and Daniel Grinnan, for the appellees.

115 HARRISON, J. This is an appeal from a decree of the chancery court of the city of Richmond.

It appears from the record that Benjamin Sutton, by the sixth clause of his will, gave to his two grandsons, William M. Lynch and Charles G. Lynch, a certain house and lot on the corner of Grace and Jefferson streets, in Richmond, for their lives, with cross-remainders to their children, and, in the event of death of both without issue, then said property was to pass to their sister, Mollie A. Lynch, or her issue.

Charles G. Lynch died, leaving two children, who, under the terms of said will, are now the fee-simple owners of their father's moiety. On the twenty-seventh day of April, 1893, William M. **116** Lynch, the life tenant in one moiety of said property, filed his bill in the chancery court of Richmond, praying for a sale of this property for partition, and a reinvestment of the proceeds, and for general relief.

To this bill he makes as parties defendant, his own five children, remaindermen in his moiety, the two children of his brother Charles, fee-simple owners of their father's moiety, and his sister, Mollie A. Lynch. His children and his brother's children are all infants, and appear by guardian ad litem.

All the proceedings in the case are regular, full, and complete. The commissioner's report and the evidence fully establishes the propriety of granting the prayer of the bill. The court decreed the sale, and it was made in accordance with the terms prescribed to James D. Carneal. An upset bid was put in, and, at a second sale, said Carneal became the purchaser at eleven thousand five hundred and seventy-five dollars, and on the twenty-sixth day of June, 1893, the court entered a decree confirming said sale, but reserving to the purchaser leave to have the title examined within a reasonable time. Counsel for the purchaser examined the title, and made two objections thereto. The court overruled both objections, and on the ninth day of August, 1893, entered a decree fully confirming the sale to J. D. Carneal, and directing that he forthwith comply with the terms. It is from this decree that the case is before this court on appeal.

There are two assignments of error, which are the two objections made by the appellant to the title to the property. The first is that William M. Lynch being only a life tenant in one moiety of the land, the remaindermen of said moiety being unascertained, and the other moiety being owned in fee simple by infants, he, the said William M. Lynch, had no power in law to maintain a suit for partition and sale of the whole of said land.

This presents the simple question whether a life tenant of one moiety of land can maintain a suit for partition against ¹¹⁷ the remaindermen, in esse, of that moiety, and the fee-simple owners of the other moiety.

The bill is framed in a double aspect, being brought under section 2432 of the code, which provides for the sale of contingent estates, and under section 2562, which provides for the partition of lands. This latter section provides that "tenants in common, joint tenants, and coparceners shall be compellable to make partition," etc. If, then, William M. Lynch, the life tenant in one moiety, is, in law, a tenant in common with the children of his brother, who are the owners in fee of the other moiety, it would seem clear that he can maintain a suit to compel partition against his cotenants.

Mr. Minor says: "A tenancy in common is where two or more hold the same land, with interests accruing under different titles; or accruing under the same title, but at different periods; or conferred by words of limitations importing that the grantees are to take in distinct shares": 2 Minor's Institutes, 494, citing 1 Stephen's Commentaries, 323.

Judge Lomax says: "A tenancy in common is where two or more persons hold lands or tenements in fee simple, fee tail, or for term of life, or years, by several titles, not by a joint title, and occupy the same lands or tenements in common; from which circumstance, they are called tenants in common, and their estate a tenancy in common": 1 Lomax's Digest, 641.

According to these high authorities, one of the conditions creating a tenancy in common is, where two or more persons hold the same land, with interests accruing under the same title, but at different times. The record shows that the interests in this land accrued under the same title, viz., the will of Benjamin Sutton. It further shows that the interest of William M. Lynch accrued not later than November 11, 1871, that being the date of the probate of Benjamin Sutton's will (the record does not show the date of Benjamin Sutton's death), ¹¹⁸ and that the interest of Dorsie Lynch and Charlie Lynch accrued September 21, 1881, that being the date of the death of their father, Charles G. Lynch. It follows, therefore, that William M. Lynch, the life tenant of one moiety, and the children of Charles G. Lynch, fee-simple owners of the other moiety, are plainly tenants in common. They hold the same land, with interests accruing under the same title, but at different times, and, being

tenants in common, the right of either to compel partition in equity is provided for, and must be upheld under section 2562 of the code of 1887.

We do not perceive the force of the objection that a life tenant of a part cannot maintain a suit against his cotenants, who own the fee of the other part, for partition. There can be no doubt that the fee-simple owners could maintain the suit for partition against the life tenant, as defendant, and the manner in which the parties to the suit are arranged can make no difference. A party having a life estate, determinable on his marriage, in one-fifth of an estate, applied in chancery for partition. The defendants were entitled to the remaining four-fifths as tenants in common in tail, and were together entitled to the reversion of the plaintiff's fifth. The defendants all desired that the property should remain undivided. The master of the rolls said: "As tenant for life, I apprehend there can be no question but that he is entitled to partition," and it was accordingly granted: Freeman on Cotenancy and Partition, sec. 455, p. 554.

"A tenant for life of an undivided share of an estate, with remainders to his unborn sons, in tail, may file a bill for partition; and the decree will be binding on the sons when in esse": Gaskell v. Gaskell, 6 Sim. 643.

"The owner of a life interest in an undivided part of land may have partition, or, if that be impracticable, a sale of the property and division of the proceeds": Shaw v. Beers, 84 Ind. 528.

119 "When the titles are clear upon the record (whatever may be the estates, whether in fee, for life, or for years), the court orders a commission of partition to issue": 2 Minor's Institutes, 487.

It is insisted by the appellants that, inasmuch as the will of Benjamin Sutton provides that the moiety given to William M. Lynch for life shall pass at his death to his children, and said Lynch is still living, therefore, the owners in remainder of that interest are unascertained. Grant that this is so. Section 2432 of the code, under which this suit is maintained, in one aspect, provides fully for the sale of all contingent interests such as exist in this case, and was intended to facilitate the sale of property where just such difficulties existed. We are, therefore, of the opinion that, under the statutes of Virginia, as well as upon precedent, a tenant for life in one moiety of property may maintain a suit against those who own the estate in remainder of said moiety, whether in esse or not, and the fee-simple owners of the

other half, and compel partition of said property; and, if not susceptible of partition in kind, may have a sale and division of the proceeds.

The second assignment of error is, that the court erred in overruling the objection of J. D. Carneal to the title, on the ground that it was advertised and sold as fronting sixty-seven feet one and one-half inches on Grace street, in the city of Richmond, and running back one hundred and fifty-four feet, when, as a matter of fact, it fronted on Grace street only sixty-four feet seven inches, the difference of two feet five and one-half inches being embraced in a part of Jefferson street.

It appears from the record that there was a plat of this property made, distinctly showing the encroachment on Jefferson street, and that, in the advertisement of the property for sale, this plat was referred to as being at the auctioneer's office, where it could be seen by any who were interested in the sale. It further appears from the record that this plat with red lines plainly defining the encroachment of two feet five and one-half ¹²⁰ inches on Jefferson street, was exhibited at the sale, examined by bidders, and the encroachment referred to, discussed in an open and general way; that J. D. Carneal, the purchaser, had every opportunity to see and examine said plat and the papers in the cause, and that, if he did not know of the encroachment of the buildings on Jefferson street, it was his own fault, and no blame attached to anyone else. Carneal admits that he saw the plat at the first sale, but says that he did not examine it. His ignorance, then, of the fact disclosed by the plat is no excuse. "It was his duty to make inquiry, and inquiry duly pursued would have led to knowledge. It will not do for him to shut his eyes, and then say that he did not see; whenever inquiry is a duty, the party bound to make it is affected with the knowledge of all which he would have discovered had he performed the duty. Means of knowledge with the duty of using them, are, in equity, equivalent to knowledge itself": *Long v. Weller*, 29 Gratt. 347, 353, 354. But is there in fact any deficiency in the width of the lot in question, growing out of the alleged encroachment of two feet five and one-half inches on Jefferson street? The legislature, by an act approved March 10, 1884 (see Acts 1883-84, p. 494), giving the city council power to remove buildings and other obstructions, where they encroach upon the streets, expressly provides that in every case where a building encroaches upon the street on a corner lot, and has so

continued for a period of twenty years, it shall constitute an adverse possession to, and confer property rights upon, the persons claiming thereunder, as against the city. It appears from the record that this lot and the buildings thereon was conveyed to Benjamin Sutton, December 30, 1858. He and those holding under him had therefore been in possession at the date of the act of March 10, 1884, more than twenty-five years, and, it being a corner lot, it would seem that the legislature had confirmed the title of the owners, as against the city, to the encroachment of two ¹²¹ feet five and one-half inches on Jefferson street: See *Meyer v. Lincoln*, 33 Neb. 560; 29 Am. St. Rep. 500; *Wheeling v. Campbell*, 12 W. Va. 36.

For the foregoing reasons, we are of opinion that there is no son street: See *Meyer v. Lincoln*, 33 Neb. 566; 29 Am. St. Rep. 500; *Wheeling v. Campbell*, 12 W. Va. 36.

PARTITION.—Remaindermen or reversioners cannot compel partition as against a life tenant in possession: *Savage v. Savage*, 19 Or. 112; 20 Am. St. Rep. 795, and note; extended note to *Nichols v. Nichols*, 67 Am. Dec. 703.

NOTICE—MEANS OF KNOWLEDGE—DUTY TO USE.—Implied notice is imputed to a party shown to be conscious of having means of knowledge which he does not use: *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295. One is generally charged with notice of a fact who has information putting him on inquiry, if, by following up such information with diligence and understanding, the truth could have been ascertained: *Jennings v. Todd*, 118 Mo. 296; 40 Am. St. Rep. 373, and note. See, also, the note to *Montgomery v. Keppel*, 7 Am. St. Rep. 129.

WILSON v. CARPENTER.

[91 VIRGINIA, 182.]

VENDOR AND VENDEE—RESCISSION.—Whenever a purchaser has been induced by a material misrepresentation of the vendor to buy, he has the right to repudiate the contract—a right correlative with that of the vendor to disaffirm the sale when he has been deceived.

FALSE REPRESENTATION OF A MATERIAL FACT, constituting the inducement of a contract, on which the purchaser has a right to rely, is always a ground for rescission in a court of equity.

RESCISSION.—A MISREPRESENTATION to a purchaser of a lot in a village, that a large sum, specifying the amount, is to be invested therein in a manufacturing enterprise, if it was the inducing cause of the purchase, entitles him to rescind.

EVIDENCE OF OTHER MISREPRESENTATIONS made by the agent of the vendor to other persons to induce purchases of property are admissible, in a suit to cancel a sale made by him for his misrepresentation, not as evidence of the statements made by him to the complainant, but as showing the bent of the agent's mind on the subject of these representations.

RESCISSION—MISREPRESENTATION.—THE INTENT of the person making a misrepresentation for the purpose of inducing a purchase of property is wholly immaterial. It is sufficient to sustain the right of rescission that the statement was made, so as to mislead the party to whom it was made, and that it induced the purchase by him. He cannot be held to his contract on the ground that the person making the misrepresentation believed it to be true.

RESCISSION—BURDEN OF PROOF.—If a seller makes a misrepresentation which, from its nature, may induce the buyer to enter into a contract of purchase on the faith of it, it will be inferred that he was induced thereby to contract; and he need not prove that he in fact relied upon the representation. To rebut this presumption, the seller must either prove that the purchaser had knowledge of facts showing the representation to be false, or he stated in terms, or showed by his conduct, that he acted upon his own judgment.

RESCISSION.—MEANS ON THE PART OF A PURCHASER OF DISCOVERING that a representation was false do not destroy his right to rescind.

WAIVER.—No man can be bound by a waiver of his rights, unless such waiver was distinctly made with full knowledge of the rights which he waived, and the fact that he knows his rights and intends to waive them must clearly appear.

Frank T. Glasgow, for the appellants.

Strayer & Liggett, for the appellee.

¹⁸⁴ HARRISON, J. Robert N. Wilson held, as trustee for himself, David B. Taylor, Thomas S. White, Fitzhugh Lee, and others, with full power to sell and convey the same, lot No. 20 in block 127 on McCullough street, in the town of Glasgow. He placed the lot in the hands of Thomas S. White & Co., real estate agents, for sale. In September, 1890, Thomas S. White sold the lot to William H. Carpenter, of Rockingham county, for the sum of \$1,500; the purchaser paying in cash \$400, and executing two bonds, for \$550 each, at six and twelve months, with interest, for the residue, receiving from R. N. Wilson, trustee, a deed of conveyance for the lot, dated September 23, 1890, and contemporaneously therewith executing a deed of trust to secure the two deferred bonds. Before the first bond became due, Carpenter paid the same. When the second bond became due, in September, 1891, it was not paid.

On the third day of November, 1891, William H. Carpenter filed his bill in the circuit court of Rockbridge county against R. N. Wilson, Thomas S. White, and the other owners of said ^{ass} lot, praying for a rescission of his contract of purchase. Before the case was ready for hearing, however, the plaintiff died, and it was revived in the name of J. N. Keagy, his administrator.

The bill sets forth the foregoing facts in regard to the sale and purchase of said lot, and alleges that the purchase was made

on the positive assurance from Thomas S. White, agent, that the Rockbridge Company, promoters of the town, had already secured beyond a doubt \$1,500,000 from an English syndicate; that this large sum of money was to be used in building up and carrying on industrial enterprises at Glasgow, which would cause real estate to advance very rapidly, start the town on a "boom" on a grand scale, and make it a manufacturing place of great importance.

The complainant further alleges that he knew nothing himself of what was proposed at Glasgow, and relied solely on the representations of said White, and, by reason of the representations and assurances thus made, and especially the representation that \$1,500,000 had been secured to be invested at once in manufactories, he was induced to buy the lot; and that, but for such assurances, he would never have invested a dollar in the town of Glasgow.

The bill further alleges, that the statements made by Thomas S. White were untrue, false, and fraudulent; that not a dollar of the English money had ever been invested in Glasgow; that the English syndicate never completed any contract with the Rockbridge Company, and that all negotiations in reference thereto have long since failed, without hope or expectation of being revived; that, so far from the lot purchased by him advancing in price, it had little or no value.

The bill prays that the contract of purchase be rescinded; that defendants be required to repay the money paid on the purchase; that the lot be reconveyed to R. N. Wilson, trustee, ¹⁸⁹² and that he be enjoined from collecting the remaining unpaid bond.

The injunction was granted as prayed for, and on the first day of March, 1892, the defendants filed their joint and separate answer, demurrer, and cross-bill, admitting the sale of the lot by their agent, White, and its purchase by Carpenter, and alleging that none of them but Thomas S. White, through whom the sale was made, were cognizant of the facts and circumstances attending the sale; the defendant Thomas S. White denying that he made the positive assurance alleged in the bill as to \$1,500,000 having been secured by the Rockbridge Company from the English syndicate, and further denying that the alleged representations and assurances caused the plaintiff to invest at Glasgow; that many prudent and cautious business men were at that time buying lots there, believing it would grow

into a large town. The respondents call for strict proof of all charges in the bill, and ask for a decree for the balance due from the purchaser.

Evidence was taken by the plaintiff and defendants, and on the twentieth day of March, 1893, a final decree was entered, overruling the demurrer; declaring that the sale of the lot was induced by false representations of the defendants, which were material, and to the injury of the purchaser; rescinding the contract of sale; canceling the unpaid bond; appointing a special commissioner to reconvey the lot to R. N. Wilson, trustee; and decreeing that the defendants pay to the administrator of William H. Carpenter \$1,070, with interest on \$947.13 from March 1, 1893, and costs of suit—that being the amount paid by his intestate on the lot. From this decree an appeal was granted the defendants, Thomas S. White and others, to this court.

The question presented by the pleadings for determination is one of fact. The law applicable to a case of this sort is too well settled to be any longer doubted or called in question. ¹⁸⁷ No man is bound by a bargain into which he has been deceived by fraud or misrepresentation. Whenever a purchaser has been induced, by a material misrepresentation of the vendor, to buy, he has a right to repudiate the contract; a right correlative with that of the vendor to disaffirm the sale when he has been defrauded. Courts of equity are always open to afford relief in such cases, and false representation of a material fact, constituting an inducement to the contract, on which the purchaser had a right to rely, is always ground for rescission of the contract by a court of equity: *Crump v. United States Min. Co.*, 7 Gratt. 352; 56 Am. Dec. 116; *Grim v. Byrd*, 32 Gratt. 293; *Linhart v. Foreman*, 77 Va. 540; *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285; *Pomeroy on Contracts*, sec. 12, p. 289.

Further elaboration of the law on this subject would be unprofitable repetition. It is only necessary to consider the evidence, and determine whether or not it makes a case entitling the plaintiff to a rescission of the contract, as prayed for in the bill.

The depositions of L. A. Crenshaw, of Richmond, and J. G. Millinger, of Frederick county—two intelligent and disinterested witnesses—have been taken by the plaintiff. They were both in Glasgow in September, 1890, and present with William H. Carpenter and Thomas S. White, and heard the conversation which led to the purchase of the lot by Carpenter.

L. A. Crenshaw testified that White made to Carpenter the representation and assurance that the \$1,500,000 of English money had already been secured by the Rockbridge Company; that it would be at once invested in manufacturing enterprises in Glasgow; that it would cause the town to build up rapidly, and that those who purchased lots then would realize very handsome profits in a very short time; that there was nothing in Glasgow to induce a man to invest money, except this representation that \$1,500,000 had been secured for the purpose of building industrial enterprises there.

¹⁸⁸ J. G. Millinger testified still more clearly and strongly to this representation made by White to Carpenter. He says that White stated in the most positive and unqualified way that the English money had been already secured through William A. Anderson, the vice-president of the Rockbridge Company, who was then in England; that nothing remained but for General Fitzhugh Lee, the president of the company, to sign the contract. He says: "I heard White tell Carpenter that the \$1,500,000 was secured, and the lot would advance rapidly in value; that the money was to be all invested at once in manufacturing enterprises, which would build the town up very rapidly." The witness says that he was informed that Mr. White was a reliable man, and that he did not doubt the truth of his statements to Carpenter; that he had Mr. White's word for it, and had no doubt of its truth; that nothing was lacking, so far as that was concerned, to induce witness to buy. He did not buy, however, because he concluded it would be best to wait until the manufactories were built; not because he doubted Mr. White's statement, but because he thought there would be as much room for speculation after they were built as before.

This testimony proves clearly and satisfactorily that the representation of Thomas S. White that the Rockbridge Company had secured \$1,500,000 was made by him as charged in the plaintiff's bill. It is a conceded fact in the case that it never was secured, and the evidence shows that it was never at any time certain that it would be.

Mr. Anderson, in his report from London to the company, dated August 27, 1890, says: "A graver question is, Will the contract be made good by the payment of the money?" In his deposition, he says he cabled General Fitzhugh Lee, the president of the company, to call a meeting of the board, and added these words: "Nothing certain until contract ratified and money paid."

There was nothing in these communications ¹⁸⁹ to justify the assurance that the English money had actually been secured.

The witness Crenshaw files with his deposition several letters received by him from Thomas S. White & Co. The first is without date, but the witness says it was written about the time of the sale of this lot to Carpenter. In this letter the writer says: "English money, actually in Glasgow Commercial Bank, and company registered in London last week; this being the last official act necessary to bringing out the British company." The second letter is dated November 3, 1890, in which the writer says: "The English question is settled at last. We get the first installment of \$70,000 on the 20th prox." The third letter is dated November 7, 1890, in which it is said: "We have it from General Lee, Judge Edmondson, and other Glasgow directors that the English deal is absolutely and irretrievably closed."

The representations in these letters are not evidence of the statements made by White to Carpenter at the time of the sale of the lot to him, but they are very persuasive as showing the bent of Mr. White's mind on the subject of this English money.

There is no evidence in the record that weakens the force of the testimony of the witnesses Crenshaw and Millinger. Their evidence is conclusive of the question that the representations were made as charged by the purchaser in his bill. It cannot be doubted that the statement was made for the purpose of procuring the contract, and it is conceded to be untrue. As to the knowledge and belief of Thomas S. White in making this statement, it is unnecessary to inquire. It should be stated, however, that counsel for appellee properly disclaim any purpose to charge willful fraud, nor does this court hold the appellant guilty of intentional fraud and misrepresentation. It is a matter of no consequence to William H. Carpenter what Mr. White thought. The intent of the party making the ¹⁹⁰ representation is wholly immaterial. The point is, has the other party been misled? It is sufficient that the statement is actually untrue, so as to mislead the party to whom it is made. The party making it need not know of its falsity, nor have any intent to deceive; nor does his mere belief in its truth make any difference. A party making a statement as true, for the purpose of influencing the conduct of the other party, is bound to know that it is true: *Pomeroy on Contracts*, sec. 217.

It is contended by counsel for appellant that Carpenter did not rely upon the representations of Thomas S. White, but was in-

fluenced by other considerations. There is nothing in the record to show this. On the contrary, the tendency of all the evidence is to establish the fact that he was controlled in this purchase entirely by his confidence in White, who had been highly recommended to him by D. B. Taylor, one of the owners of the lot sold; and that he was induced to buy almost exclusively by the representation about the large sum of money secured in England.

When the seller has made a false representation, which, from its nature, might induce the buyer to enter into the contract on the faith of it, it will be inferred that the buyer was induced thereby to contract, and it does not rest with him to show that he, in fact, relied upon the representation. In order to displace this inference, the seller must prove either that the buyer had knowledge of facts which showed the representation to be untrue or that he expressly stated in terms, or showed by his contract, that he did not rely upon the representation, but acted upon his own judgment.

Nor is the buyer deprived of his right to relief because he had the means of discovering that the representation was false: *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1, quoted in *Benjamin on Sales*, 499.

The last element of a misrepresentation is its materiality. The evidence shows that Carpenter gave \$1,500 for this lot,¹⁹¹ and that it is not worth now \$50, if anything. It can hardly be doubted that, if \$1,500,000 of English capital had been invested at Glasgow in manufacturing enterprises, this lot would be worth more than it is now. The court does not inquire with any care into the extent of the prejudice. It is sufficient if the party misled has been very slightly prejudiced—if the amount is at all appreciable: *Pomeroy on Contracts*, sec. 227.

Counsel for appellants insist that, even if Carpenter had any ground of complaint originally, he ratified fully what he had done, after the collapse at Glasgow; and, in support of this contention, refer to certain letters of Carpenter written to R. N. Wilson, trustee, and Thomas S. White & Co., after February 20, 1891, when all further negotiation with the English ceased. This fact, it is said, became generally known, and should have been known to Carpenter, too, and that in these letters he should have referred to White's representations, and his reliance upon them.

These letters do not sustain this view. Wilson, trustee, had

been writing, urging the payment of the last bond in advance of its maturity. Carpenter's letters to him were in response, telling him he was unable to pay, and could not pay the bond when due, unless the lot was sold; and urging Wilson not to put his note in bank for collection; that he would pay it as soon as possible. The letters to Thomas S. White & Co. were in reference to the value and prospect of selling the lot. And as late as April, 1891, one of these letters was asking White if he could get more than \$2,500 for the lot, and reminding him of his expressed opinion that such price could be obtained in April. It is impossible to believe that Carpenter knew, when that letter was written, that all hope of getting the English money had some time before ceased. All these letters indicate that Carpenter was ignorant of the fact. He could not have entertained the hope, expressed by him, of selling the lot, if he had known it.

¹⁹² The record discloses no word or act of Carpenter that can fairly be regarded as a ratification of his purchase from Thomas S. White, after becoming acquainted with the misrepresentation by which he had been induced to buy. "Confirmation must be a solemn and deliberate act. When the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the courts watch it with the utmost strictness, and do not allow it to stand but on the clearest evidence": *Cumberland Coal etc. Co. v. Sherman*, 20 Md. 117.

No man can be bound by a waiver of his rights, unless such waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them, must plainly appear: *Montague vs. Massey*, 76 Va. 307.

The views which have been expressed support the decree of the circuit court, and it must be affirmed.

Keith, P., Riely, and Buchanan, JJ., concur with Harrison, J.

CARDWELL, J., dissenting. I do not disagree with my brethren as to the law of this case, but, applying the law to the evidence, I am unable to agree that appellee is entitled to the relief afforded him by the decree of the circuit court of Rockbridge county complained of.

VENDOR AND PURCHASER—RESCISSION BY PURCHASER FOR MISREPRESENTATION.—Misrepresentation of material facts regarding the quality and title to land, made by the vendor, and relied upon by the vendee as true, is sufficient ground for rescission of the

sale: *Cressler v. Rees*, 27 Neb. 515; 20 Am. St. Rep. 691, and note; note to *Sutton v. Morgan*, 38 Am. St. Rep. 845. See, further, the extended notes to *Cottrill v. Krum*, 18 Am. St. Rep. 556, and *Richardson v. McKinson*, 12 Am. Dec. 312.

CONTRACTS—RESCISSION OF, FOR FALSE REPRESENTATIONS.—Courts of equity cancel contracts for false representations of material facts which constitute an inducement to the contract, and upon which the party had a right to rely: *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285, and note. See, especially, the note to *Arnold v. Hagerman*, 14 Am. St. Rep. 724, 725.

MISREPRESENTATIONS—INTENT.—On an express representation, which turns out untrue, it is immaterial whether the party making it knew it to be false or not: *Waters v. Mattingly*, 1 Bibb, 244; 4 Am. Dec. 631, and note. When a person is in a situation to know, and it is his duty to know, whether a statement, upon the faith of which another has been induced to enter into a contract, is true or false, the law imputes such knowledge to him, and the statement, if untrue, is held to be fraudulent as regards the person who relied upon it: *Prewitt v. Trimble*, 92 Ky. 176; 36 Am. St. Rep. 586, and note with the cases collected.

EVIDENCE OF OTHER ACTS.—Acts which are part of one general scheme or plan of fraud, designed or put in execution by the same person, are admissible to prove that an act which has been done by someone, was, in fact, done by the person who designed and pursued the plan, if the act in question was a necessary part of the plan: *Fowle v. Child*, 164 Mass. 210; 49 Am. St. Rep. 451.

GEORGIA HOME INSURANCE CO. v. BARTLETT.

[91 VIRGINIA, 305.]

INSURANCE—CHANGE IN TITLE AND POSSESSION.—The appointment of a receiver is not such a change in the title or possession of property as avoids a policy of insurance containing a condition that it shall become void if any change takes place in the title or possession of the property, whether by sale or judicial decree, without notice to the insurer and its consent indorsed thereon.

INSURANCE.—APPOINTMENT OF A TRUSTEE to take the place of other trustees who held the property in trust when the insurance was effected, is not a change in the title or possession, within the meaning of a condition in a policy making it void if a change takes place in the title or possession without the consent of the insurer.

INSURANCE.—A CHANGE OR TRANSFER of the interest of the insured which will avoid a policy, under a condition therein declaring it shall become void if such a change takes place without the consent of the insurer, must be of such a character as is calculated to make him less watchful in caring for and preserving the property insured; but if the real ownership remains the same, though there is a change in the evidence of title, such change being merely nominal, and not of a nature calculated to diminish the motives of the assured to guard it from loss, the policy is not violated.

INSURANCE.—CONDITIONS in a policy of insurance should be strictly construed against the insurer, and liberally in favor of the assured.

Wppa Hunton, Jr., for the plaintiff in error.

Marshall McCormick and Charles M. Brown, for the defendant in error.

§10 HARRISON, J. This is an action of assumpsit, brought in the circuit court of Page county, by the Valley Land and Improvement Company, for the use of J. Kemp Bartlett, Jr., trustee, against the Georgia Home Insurance Company, to obtain judgment upon a policy of insurance executed by the defendant on the twenty-third day of August, 1891, upon the property of the Valley Land and Improvement Company, situated at Luray, in the county of Page.

On the twenty-first day of April, 1894, the following verdict was rendered: "We, the jury, find for the plaintiff, and assess the damages at \$4,308.84, with interest from January 28, 1892, till paid." The question presented for our consideration was raised, upon the trial, by the circuit court refusing to give the following instruction, asked for by the defendant.

"The court further instructs the jury that if there is any change in the possession of the property insured, between the date of the policy and the date of the fire, without the consent or knowledge of the company, the jury must find for the defendant, unless the said company has waived the said provision of the said policy."

There were other instructions asked for by the plaintiff and refused by the court, but, in the view taken of this case, it is only necessary to consider the one quoted.

§11 The policy of insurance sued upon contains the following usual provision: "Or if any change takes place in the title or possession of the property, whether by sale or judicial decree, without notice to the company and its consent indorsed thereon, then the policy shall be void."

It is claimed by the insurance company that, after the policy was executed, there was a change of the possession of the property insured, and, consequently, a forfeiture under the clause just quoted.

The facts disclosed by the record are as follows: On the eighteenth day of April, 1891, the Valley Land and Improvement Company, duly incorporated, conveyed a very large amount of real and personal property, including the Luray Inn and Caverns, in Page county, to H. J. Smoot and four others, as trustees, to secure a heavy general indebtedness due from said company. On the first day of May, 1891, the company leased the Luray Inn, together with the grounds and curtilage, which had been conveyed in the deed of trust, to one Frederick W. Evans.

On the third day of August, 1891, certain creditors of the

company filed their bill in the circuit court of Page county, asking the court to enjoin a sale of the property, which had been advertised by the trustees, and further praying for the appointment of a receiver to take charge of the property, and that the trust might be administered under the orders of the court. On the tenth day of August, 1891, the court entered a decree declining to appoint a receiver, or to enjoin the sale, but directed the trustees to proceed to sell the property on the terms prescribed by the deed of April 18, 1891, and to report any sale made to the court, and to hold any money received subject to the order of the court.

On the twenty-third day of August, 1891, the trustees secured and had placed upon the property of the company, real and personal, fire insurance policies to the amount of about \$100,000, ⁸¹² distributed among twenty-seven different companies, for which insurance a premium of \$1,892.70 was paid. Among these policies was that of the Georgia Home Insurance Company, defendant in this suit, for \$5,000, which was placed upon the Luray Inn.

On the twenty-sixth day of September, 1891, H. J. Smoot and others, trustees, made their report to the circuit court, settled their accounts, and resigned their positions as trustees. The court entered an order ratifying and confirming all their acts and doings as trustees, and appointed J. Kemp Bartlett, Jr., as substituted trustee in their room and stead (Bartlett was the president of the Valley Land and Improvement Company, whose property was insured), "with all the duties and responsibilities required by law," and with the power, among others, to lease out the Luray Inn and collect the rents. Bartlett was required to give bond and security, and to make report of his acts and doings as trustee to the court. He did not, however, qualify as substituted trustee by giving the required bond, until the sixteenth day of October, 1891, and on the fifth day of November, 1891, the Luray Inn was destroyed by fire.

It is earnestly contended by counsel for plaintiff in error that the terms of the decree appointing J. Kemp Bartlett, Jr., as substituted trustee, in effect made him a receiver of the property, and that the change from H. J. Smoot and others, trustees, to J. Kemp Bartlett, Jr., receiver, was such a change in the possession of the property insured as to release the insurer from all liability to pay the loss. In *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, it is held that a change of receivers is not such a change of possession, or title, as to forfeit the policy. The ob-

jection here is, that this was a change from a trustee to a receiver. We understand counsel for plaintiff in error to admit that if the court had appointed one of the original trustees receiver, instead of Bartlett, there would have been no change of possession affecting the policy. ³¹³ This position is unquestionably sound, and it follows, as a consequence, that the court could have appointed H. J. Smoot, one of the original trustees, as receiver, and, subsequently to such appointment, changed the receiver by removing H. J. Smoot and appointing J. Kemp Bartlett, Jr., in his place, and under the law as laid down by the supreme court of the United States in *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, it would not have worked a forfeiture of the policy, because it would have been only a change of receivers. I can see no propriety in the court adopting the circuitous method suggested for appointing Bartlett receiver. It would have been a vain thing. Nor do I think his appointment as receiver, in the mode adopted by the court, wrought any such change in the possession or title of the property as is contemplated by the clause of the policy under consideration.

"A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property": *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 236. Under this authority, it may be conceded that the effect of the decree of September 26, 1891, was to make Bartlett a receiver. Still, that did not change the title or right of possession in the property. H. J. Smoot and others, trustees, were, presumably with the consent of the Valley Land and Improvement Company, acting as receivers in fact, though not in law, and the change from them to J. Kemp Bartlett, Jr., as receiver could not, under *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, have operated to forfeit the policy. I do not think the sound and just rule laid down in the case cited can be limited to a change of receivers. I think the same reasoning ³¹⁴ would apply to a change of trustees, or a change from a trustee in control to a receiver in like control. In fact, no change of this character, merely affecting the control of the rents of the property, is the change contemplated by the policy, and therefore would not forfeit the in-

insurance. This condition in the policy against alienation refers only to such a sale or disposition of the property as causes all interest of the assured in, or control over, the property to cease: *Commercial Union etc. Co. v. Scammon*, 126 Ill. 355; 9 Am. St. Rep. 607. The object of providing against a transfer or change of title or possession is to guard against a diminution in the strength of the motive which the insured may have to be vigilant in the care of his property.

"Any change in, or transfer of, the interest of the insured in the property, of a nature calculated" to make the insured less watchful in guarding and preserving the property from destruction by fire, "is in violation of the policy. But if the real ownership remains the same, if there is no change in the fact of title, but only in the evidence of it, and if this latter change is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard the property from loss by fire, the policy is not violated": *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 185, 186; 85 Am. Dec. 553.

Now, let us consider what change had taken place in the possession of the property insured that is complained of by the plaintiff in error.

At the time the assurer executed the policy, the insured property was in the lawful possession of the Valley Land and Improvement Company. It was in the actual possession of Frederick W. Evans, under a lease. The policy was taken out in the name of the Valley Land and Improvement Company, and made payable, in the event of loss, to H. J. Smoot and others, trustees, "as their interest may appear." The trustees, presumably with the consent of the owner, the Valley ³¹⁵ Land and Improvement Company, were collecting the rents from the property, and disbursing the same in discharge of their duties as trustees.

At the time of the fire, the property was still in the lawful possession of the Valley Land and Improvement Company, and it was still in the actual possession of Frederick W. Evans, as lessee. The only change that had taken place was, that the court had appointed J. Kemp Bartlett, Jr., as the hand to receive and sign receipts for rent arising from the Luray Inn, in the room and stead of H. J. Smoot and others, trustees, resigned. The only act performed by J. Kemp Bartlett, Jr., as receiver, after his qualification on the 16th of October, 1891, disclosed by the record, was to make an indorsement thereon, extending for a further time the same lease that was on the property when

the policy was executed, thus continuing the property in the actual possession of the same lessee.

We must look at the substance of things, and not at the shadow. The purpose of the clause under consideration was not to work a forfeiture; it was intended to protect the insurer against wrong or injury. The plaintiff in error has not been injured by J. Kemp Bartlett, Jr., having been appointed to receive and receipt for rents arising from the Luray Inn in the place of H. J. Smoot and others. Whether he performed that duty as receiver or as substituted trustee, in either case he was doing no more than the trustees were doing when the policy was executed.

Nor has the appointment of J. Kemp Bartlett, Jr., as receiver, produced any such change of interest in the property as to make the assured less watchful in guarding and preserving it from destruction by fire, and, consequently, there has been no forfeiture of the policy. It is a fact worthy of note that the large insurance on this property, nearly one hundred thousand dollars, represented by twenty-seven different companies, was promptly paid without question under the advice of counsel, except by ³¹⁶ one insolvent company and the plaintiff in error here; and it is conceded that all these companies had the same provision in their policies that is relied on to forfeit the policy in this case.

These insurance policies abound with innumerable stipulations, forfeitures, and provisions hard to understand, and difficult of performance, and it is a well-settled rule that they must be strictly construed against the insurer, and liberally in favor of the insured.

For the foregoing reasons, I am of opinion that there is no error in the judgment of the circuit court, and it must be affirmed.

The other judges concur in the opinion of Harrison, J.

INSURANCE—CHANGE OF TITLE.—Any material change in title, though not by alienation, will avoid an insurance policy which provides that any alteration or change in the title shall avoid it: *Barnes v. Union Mut. etc. Ins. Co.*, 51 Me. 110; 81 Am. Dec. 562, and note. See the extended notes to *Morrison v. Tennessee etc. Ins. Co.*, 59 Am. Dec. 307-312, and *Lane v. Maine etc. Ins. Co.*, 28 Am. Dec. 154.

INSURANCE. — CONSTRUCTIVE POSSESSION OF INSURED GOODS BY A SHERIFF under an execution is not such change of possession as avoids the policy of insurance: *Phoenix Ins. Co. v. Lawrence*, 4 Met. 9; 81 Am. Dec. 521.

MARSHALL v. PALMER.

[91 VIRGINIA, 244.]

A COTENANT SUING IN EJECTMENT cannot recover possession of the whole property, though such possession is held by a stranger to the title. The plaintiff's recovery must be limited to the interest which he proves.

COTENANT SUING IN EJECTMENT MUST PROVE the extent of his interest, or suffer judgment to be given for the defendant.

Robert M. Mayo, for the plaintiff in error.

No appearance for the defendant in error.

²⁴⁵ RILEY, J. This is an action of ejectment, brought by Henry M. Marshall as one of the heirs of James Marshall, deceased.

At the trial, by agreement of the parties, a jury was waived, and all matters of law and fact submitted to the court, which rendered judgment for the defendant.

The plaintiff brought suit for the premises in controversy, both for himself and all the other heirs of James Marshall, through whom he claims, and sought to recover the entirety for himself and them.

This, I apprehend, cannot be done. One may sue in ejectment and recover less than he claims in his declaration (*Clay v. White*, 1 Munf. 162; *Callis v. Kemp*, 11 Gratt. 78; 2 *Tucker's Commentaries*, 174), but he cannot recover more than he proves that he has the title to in himself. He cannot, in his own name, as sole plaintiff, recover the respective interests of his cotenants. Their several interests, though undivided, are distinct and different. He cannot, in his own name, represent or bind his cotenants. Each must sue for himself, and in his own name. The plaintiff can only recover such interest in the premises as he may prove that he himself is entitled to: *Doe ex dem. Hellyer v. King*, 6 Ex. 791; *Doe ex dem. Saul v. Dawson*, 3 Wils. 49; *Gray v. Givens*, 26 Mo. 291, 303; *Dewey v. Brown*, 2 Pick. 387.

And while one may bring suit for the whole of the premises, and his action will not be defeated, if he should fail to prove that he was entitled to the entirety, but showed that he was entitled to some less interest, yet it is incumbent upon him not only to establish the legal title in himself to such less interest, but he must also establish the extent of such interest. If it appears that there are other persons interested with him as cotenants, he must prove what is the share or proportion of the land that belongs to him. His undivided interest must be ²⁴⁶ made certain and

definite. It must be clearly designated: Code, sec. 2747. If he fails to do this, so that it cannot be specified by the verdict of the jury or the judgment of the court, he cannot recover, and judgment must be rendered for the defendant: *Craig v. McBride*, 9 Dana, 427; *Craig v. Taylor*, 6 B. Mon. 457; *Callis v. Kemp*, 11 Gratt. 78; *Dawson v. Mills*, 32 Pa. St. 302.

The record discloses that the plaintiff in error sued as only one of the heirs of James Marshall. He does not pretend that he is the only heir, but in the declaration alleges that there are other heirs of said decedent. And the evidence offered on the trial is to the same effect.

He does not allege in his declaration the names or the number of the heirs. Neither does he state the extent of his undivided share or interest in the land, nor the proportion to which he is entitled. Nor does the evidence supply this fatal defect. It only shows that he is one of the said heirs. They may be few, or they may be many. The extent of the interest which the plaintiff claims for himself is left wholly in doubt. There is nothing in the entire record by which his interest may be designated or rendered certain; nothing on which a judgment in his favor could be founded, even if we were to come to the conclusion that the heirs of James Marshall were entitled to recover the premises sued for, as to which we do not wish to be considered as expressing or intimating any opinion whatever.

No other judgment could have been rendered by the circuit court of Northumberland county than for the defendant, and for the foregoing reasons the same is affirmed.

Actions by a Cotenant to Recover Possession of the Property of the Cotenancy.

General Rights of as to Possession.—We should naturally expect in every logically constructed system of laws that the remedies granted to every class of persons would correspond to their conceded rights, and that whenever a right was granted, there should be a corresponding remedy for its protection or enforcement. As preliminary to the consideration of actions by a cotenant to recover possession of the property of the cotenancy, or of his share thereof, we may properly begin by inquiring when he is entitled to such possession. As a result of this inquiry, we shall find that, as against persons who are not his cotenants, he has a right to the exclusive possession of the property of the cotenancy, whether real or personal: *Freeman on Cotenancy and Partition*, sec. 343; *Allen v. Higgins*, 9 Wash. 443; 43 Am. St. Rep. 847; *Williams v. Sutton*, 43 Cal. 65; *Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108; *Newman v. Bank of California*, 80 Cal. 368; 13 Am. St. Rep. 169; *George v. McGovern*, 83 Wis. 555; 35 Am. St. Rep. 77; but that, as against his cotenants, he has no better right than any of the others to the possession of the property, and, as a consequence, that he cannot compel any of them to surrender their possession to him, though each of them must permit him to share in the possession and use of their

property, when it is of such a character that two or more persons may at the same time be in possession of it: Freeman on Cotenancy and Partition, secs. 87, 236, 248. This joint or common possession is generally, and perhaps always, possible with respect to real property, but the greater part of personal property is of such a nature that two persons cannot at the same time share its use or possession; and where such is the case, the cotenant who happens to be in possession has the right to so continue until one of his cotenants has an opportunity peaceably to take such possession upon himself: Freeman on Cotenancy and Partition, secs. 245, 250.

An Action by a Cotenant to Recover Possession of Personal Property ought, for the purpose of fully vindicating his rights, to be sustainable in every instance where a third person unlawfully holds such possession. It is clear, as a matter of law, that such third person has no right to such possession, and that the cotenant has, and therefore it ought to follow that an action by the latter to obtain what is wrongfully withheld from him by the former must necessarily succeed. But from a very early date the rule prevailed at the common law, that the right of co-owners of personal property to its possession was a joint right, to be vindicated only by a joint action. Hence, it was impossible for a single cotenant, or any less number than all, to maintain an action to recover the personal property of the cotenancy from a third person, at least if he pleaded nonjoinder of the others as a defense, or such defense was otherwise brought to the attention of the court: Freeman on Cotenancy and Partition, secs. 337, 355; Hart v. Fitzgerald, 2 Mass. 511; 3 Am. Dec. 75; May v. Parker, 12 Pick. 38; 22 Am. Dec. 393; Cain v. Wright, 5 Jones, 282; 72 Am. Dec. 551; Pritchard v. Culver, 2 Harr. (Del.) 129; Miller v. Eatman, 11 Ala. 614; Corcoran v. White, 146 Mass. 329; 4 Am. St. Rep. 313; Fay v. Duggan, 135 Mass. 242; Clapp v. Pawtucket Sav. Inst., 15 R. I. 489; 2 Am. St. Rep. 915.

This rule of law may, perhaps, be mitigated by the provisions generally contained in the codes of procedure of the several states authorizing a plaintiff to join as defendants in an action those persons who ought to be joined as plaintiffs, upon their refusal to so join. If such refusal was based upon a desire that the defendant, though a stranger to the title, should continue in possession of the property, rather than that it be delivered to the tenant who is seeking possession, it is difficult to see how the joining of the nonconsenting cotenants, as defendants, could entitle the plaintiff to recover, for they have the same right to control the possession as the plaintiff has, and may, we think, confer upon a stranger the right of possession which they themselves have: George v. McGovern, 83 Wis. 555; 35 Am. St. Rep. 77; Freeman on Cotenancy and Partition, secs. 246, 252, 288. It, however, has been decided in one case, where the plaintiff was the only cotenant of personalty residing in the state, and his cotenants were nonresidents, so that they could not be brought before the court as defendants, and they refused to join in the action, that the plaintiff might maintain an action to recover the value of certain personal property which had been sold by the defendant under judgments which had subsequently been reversed: Peck v. McLean, 36 Minn. 228; 1 Am. St. Rep. 665.

If one of the cotenants has, by some proceeding on his part, become incapacitated from joining in an action to recover the property, which incapacity does not apply to the others, he cannot thereby deprive them of rights which they otherwise had. Thus, he may, without joining his cotenants, have prosecuted actions for the possession of the property, and may have been defeated after a trial on the merits, or may have recovered judgment because the fact that he was but a part owner may not have been brought to the attention of the court. In either event, he would seem to have lost his right to maintain any further action, and, therefore, his cotenants may, without joining him, recover its possession: Brizendine v. Frankfort etc. Co., 2 B. Mon. 32; 36 Am. Dec. 587; Wood v. Insurance Co., 6 Mass. 479; 4 Am. Dec. 162; Sedgworth v. Oberend, 7 Term Rep. 279; Starnes v. Quinn, 6 Ga. 84,

87; Hill v. Gibbs, 5 Hill, 56; Clapp v. Pawtucket, 15 R. L. 489; 2 Am. St. Rep. 915, 917.

There is a class of personal property, of a severable character, with reference to which either tenant in common may, at any time, in effect, make a partition by taking his portion to be held by him in severalty. Such property must exist in bulk, and be of the same quality throughout, so that the share of each cotenant can be ascertained by weight or measurement, without the assistance or consent of the others, as where they have a quantity of wheat, or other grain of the same quality, in which event either may take his share, to be thereafter held in severalty: Freeman on Cotenancy and Partition, sec. 252. Where this severance has been made, the property is no longer common property, and, therefore, is not subject to the law of cotenancy. If such severance be made by an officer claiming to act under an attachment, execution, or other writ against one of the cotenants, the latter may, by suing for the property, in effect, ratify the severance, and entitle himself to the share severed, if the officer has no right to retain it under his writ: Freeman on Cotenancy and Partition, sec. 338; Newton v. Howe, 29 Wis. 534; 9 Am. Rep. 116.

The instances in which one of the cotenants can maintain an action to recover possession of the common personalty from another are very infrequent: Freeman on Cotenancy and Partition, secs. 288, 289; Buch v. Nester, 70 Mich. 525; Kilgore v. Wood, 56 Me. 150; 96 Am. Dec. 440; George v. McGovern, 83 Wis. 555; 35 Am. St. Rep. 77; and can only exist when there has been some contract between them entitling the plaintiff to the exclusive possession of the property: Morgan v. Hedges, 4 Col. 526; Newton v. Gardner, 24 Wis. 232; or where it is of a severable character, so that the plaintiff, being entitled to sever it, has done so before the beginning of the action, or, by such action, elects to accomplish such severance. Hence, if several persons own a quantity of grain of the same quality, as a consequence of which either has the right to take his share, and his right is denied by his cotenant, the former may, in an action of replevin, recover it of the latter: Piazzek v. White, 23 Kan. 621; 33 Am. Rep. 211.

The Right of Action of a Co-owner to Recover Real Property, the possession of which is unlawfully withheld by a third person, is by common law regarded as joint when the property is held by a joint tenancy, and severable when it is held by a tenancy in common. Joint tenants and coparceners may make either a joint or a severable demise, and may recover in ejectment either jointly or severally, according as they allege the demise to be joint or several: Freeman on Cotenancy and Partition, secs. 339, 340. Tenants in common, on the other hand, were regarded as holding by several and distinct titles, and were not permitted to join in an action to recover the possession of their real property. In America, however, this common-law rule has generally been abrogated, or so modified as to permit tenants in common, either to join or to sever in actions to recover possession of real property: Freeman on Executions, sec. 341; Hillhouse v. Mix, 1 Root, 247; 1 Am. Dec. 41.

With respect to actions by a cotenant to recover possession of the real property of the cotenancy from a stranger thereto, two questions have resulted in some conflict of decision. The first of these is, whether the plaintiff may recover an interest different in quantity from that sued for, and the other is, whether his recovery must be restricted to his interest, or may be for the possession of the whole property. The authorities probably agree that in no event can he recover a greater interest than disclosed by his complaint, but a plaintiff may, in his complaint, claim to be entitled to the whole property when his ownership extends to a moiety only, or to be entitled to a moiety of a specified amount when he is entitled to a moiety of less proportion. There have been decisions in two or more states denying his right to recover at all, unless his title is proved to be precisely coextensive with the title alleged, but the very decided weight of authority sanctions his recovery to the extent of the

title proved, though in his complaint he claims a larger interest: *Freeman on Cotenancy and Partition*, sec. 842; *McFadden v. Haley*, 2 Bay, 457; 1 Am. Dec. 653; *Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108.

The second question seems to be easily disposed of upon principle, and we think there is no dissent from the proposition that each cotenant, irrespective of the character of the cotenancy, is, as against all strangers thereto, entitled to the exclusive possession of all the property thereof. Hence, we should draw the inference that his remedies ought to correspond to his rights, and that whenever a stranger to the title unlawfully seized or held possession of the property, either cotenant might recover such possession and procure a writ absolutely excluding the intruder from the possession of the property. These views are certainly indorsed by the decided majority of American decisions upon the subject: *Robinson v. Roberts*, 31 Conn. 145; *Clark v. Vaughan*, 3 Conn. 193; *Phillips v. Medbury*, 7 Conn. 572; *Sharon v. Davidson*, 4 Nev. 419; *Collier v. Corbett*, 15 Cal. 185; *Clark v. Huber*, 20 Cal. 197; *Hart v. Robertson*, 21 Cal. 348; *Rowe v. Bacigalluppi*, 21 Cal. 635; *Hibbard v. Foster*, 24 Vt. 546; *Weese v. Barker*, 7 Col. 178; *Sherin v. Larson*, 28 Minn. 523; *Crook v. Vandevort*, 13 Neb. 505; *Brown v. Warren*, 16 Nev. 228; *Overcash v. Ritchie*, 89 N. C. 384; *Contreras v. Haynes*, 61 Tex. 103; *Treat v. Reilly*, 35 Cal. 131; *Telfener v. Dillard*, 70 Tex. 139; *George v. McGovern*, 83 Wis. 555; 35 Am. St. Rep. 77; *Newman v. Bank of California*, 80 Cal. 368; 13 Am. St. Rep. 169; *McFarland v. Stone*, 17 Vt. 165; 44 Am. Dec. 325; *Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108; *Hardy v. Johnson*, 1 Wall. 373; *Allen v. Higgins*, 9 Wash. 446; 43 Am. St. Rep. 847; *Blanchard v. Floyd*, 93 Ala. 53; *Mays v. Witkowski*, 46 La. Ann. 1475; *Louder v. Schluter*, 78 Tex. 103; *McDonald v. Hamblen*, 78 Tex. 628. To hold otherwise is in effect to deny the cotenant plaintiff any substantial relief, for if he may not recover possession of the whole from the trespasser, and exclude the latter absolutely from the possession of the premises, his recovery is of little or no value, for if the stranger to the title be conceded to have a right to remain in possession, such right extends to every part and parcel of the property, and may prevent the part owner, who has recovered judgment, from making any profitable use either of the land or of any interest therein. Notwithstanding these considerations, there is a growing inclination on the part of the courts to restrict the recovery by a tenant in common, even as against a stranger to the title, to the same extent that he would be restricted if the recovery was against a cotenant; or, in other words, simply to enter a judgment entitling the plaintiff to be put in possession of the property, leaving him to share the possession with the defendant as though he also were an owner of an undivided interest, and as such entitled to share in the possession of the premises: *Dewey v. Brown*, 2 Pick. 387; *Gray v. Givens*, 26 Mo. 303; *Overcash v. Ritchie*, 89 N. C. 384; *Johnson v. Hardy*, 43 Neb. 368; 47 Am. St. Rep. 765; *King v. Hyatt*, 51 Kan. 504; 37 Am. St. Rep. 304; *Mobley v. Bruner*, 59 Pa. St. 481; 98 Am. Dec. 360; *Dawson v. Mills*, 32 Pa. St. 302. There is, however, a dictum in one of the more recent Pennsylvania decisions which, while it does not purport to overrule or consider the cases from that state last cited, appears to be inconsistent with them: *Wheeling etc. Co. v. Warrell*, 122 Pa. St. 613. The principal case, it will be observed, ignores the many decisions sustaining the right of a tenant in common to recover possession of the whole of the property, and merely cites some English and American cases tending to support a contrary view, as though they presented all the authorities to be cited upon the subject. The American cases thus cited, we concede, are in harmony with the decision in the principal case, but an examination of the English cases cited does not convince us that they are necessarily so, or that they involved any determination of the question here under consideration. That of *Roe v. Dawson*, 3 Wils. 49, was reported with exceeding brevity. The statement contained in the report is, that the plaintiff in ejectment, as tenant in common, recovered possession of five-eighths of a cottage, and that, under the writ of possession, the sheriff had turned the

tenant out of possession of the whole and locked up the door. The court said that this was wrong, and that the writ should have pursued the verdict, and that a rule should be issued upon the sheriff and the lessor of the plaintiff, to restore the tenant to possession of three-eighths part of the premises, "otherwise he would be forced to bring another ejectment for the same." There is nothing in this report to indicate that the tenant was a stranger to the title, and the suggestion, that if the rule did not issue, he might be forced to bring an action of ejectment, would indicate that he was a co-owner of the property, and might, by such action, compel the other co-owners to recognize his interest by permitting him to share the possession with them. In the case of *Doe v. King*, 6 Ex. 789, the report shows that the lessors of the plaintiff claimed under a will by which the testator had devised the property in question to his sisters, nephews, and nieces, share and share alike; that a witness, who was called to prove that one of the lessors of the plaintiff was a child of a sister of the testator, had stated on cross-examination that at the testator's death there were three sisters living, each of whom had since died, leaving children, and that he could not say how many children one of them had. It was stated that the defendant claimed as an heir at law, but whether as an heir of the testator, or of one of the persons to whom the property had been devised, is not disclosed by the report. The majority of the court was of the opinion that, because there was no proof of the exact interests of the lessors of the plaintiff, there could be no recovery in their favor. One of the judges, however, dissented, taking the position that it appeared that the person in possession was not entitled thereto, and that the plaintiff, being a cotenant of an undivided interest in the premises, was, though he had not established the precise extent of that interest, entitled to recover the whole possession, as against the defendant who had no right thereto.

Actions of Forcible Entry and Detainer, it is conceded, may be brought by a tenant in common separately, and, so far as our observation has extended, no court has insisted that a cotenant should be compelled to share the possession recovered with the defendant who had been adjudged to be guilty either of a forcible entry or a forcible detainer: *Turner v. Lumbrich*, Meigs, 11; *Allen v. Gilson*, 4 Rand. 477; *Rake v. Fyler*, 10 Smedes & M. 440; 48 Am. Dec. 763.

Ejectment by One Cotenant Against Another.—An action of ejectment is an appropriate remedy whenever either of the cotenants has been ousted by the other from the lands of the cotenancy, or any part thereof: *Adams on Ejectment*, 135; *University v. Reynolds*, 3 Vt. 542; 23 Am. Dec. 234; *Gale v. Hines*, 17 Fla. 773; *Mabie v. Whittaker*, 10 Wash. 656; *Frakes v. Elliott*, 102 Ind. 47; *Falconer v. Roberts*, 88 Mo. 574; *Jones v. De Lassus*, 84 Mo. 541.

Necessity of Ouster.—There are a few authorities which declare, in general terms, that one tenant in common may maintain ejectment against his cotenant, though no actual ouster can be proved: See remark of Spencer, J., in *Shepard v. Ryers*, 15 Johns. 501; *Eads v. Rucker*, 2 Dana, 111. These general declarations, as we apprehend, do not indicate any conflict of judicial opinion on this subject. Their apparent dissent from the well-established rule of law, that an ouster is requisite to an action of ejectment, is, in all probability, the result of the employment of the word "ouster" as necessarily signifying an actual expulsion by force. If that were its only signification, then instances might frequently arise where a tenant in common could sustain an action of ejectment against his cotenant without showing an ouster. But, at least between cotenants, the term "ouster" may denote, either an actual turning out, or an exclusive possession connected with some act amounting to a total denial of the rights of the cotenant who is out of possession. The fact of ouster, in one or the other of these senses, is a prerequisite to the right of each cotenant to maintain an action of ejectment against his fellow-tenant: *Sigler v. Van Riper*, 10 Wend. 419; *Ewald v. Corbett*, 32 Cal. 499; *Story v. Saunders*, 8 Humph. 638; *Higbee v. Rice*, 5 Mass. 351; 4 Am. Dec. 63; *Outts v. King*, 5 Greenl. 482; *Cross*

v. Robinson, 21 Conn. 385; Gilchrist v. Ramsay, 27 U. C. Q. B. 500; Taylor v. Hill, 10 Leigh, 457; Carpentier v. Mendenhall, 28 Cal. 485; 87 Am. Dec. 135; Halford v. Tetherow, 2 Jones, 393; Jones v. Weathersbee, 4 Strob. 50; 51 Am. Dec. 653; Goldsmith v. Smith, 4 West Coast Rep. 7; Allen v. Long, 80 Tex. 261; 26 Am. St. Rep. 735. The question whether a given state of facts, as between cotenants, constitutes an ouster, arises: 1. Where the defendant claims that he is not subject to any action in ejectment, for the reason that his possession is consistent with the plaintiff's rights; and 2. Where the defendant claims that his possession has been so inconsistent with plaintiff's rights as to grow into a perfect title in severalty by virtue of the statute of limitations. In whichever of these two forms an issue in regard to ouster arises, its determination is a question of fact for the jury: Clark v. Crego, 47 Barb. 617; Carpentier v. Mendenhall, 28 Cal. 484, 87 Am. Dec. 135. It is scarcely within the purpose of this note to consider what evidence may properly be regarded as sufficient to sustain the allegation that the plaintiff has been ousted by the defendant whom he concedes to be his tenant in common. The question will be found discussed at length in sections 221 to 244 of Freeman on Cotenancy and Partition. It is, perhaps, proper, however, in this place to remark that the evidence of ouster and adverse possession necessary to sustain an action of ejectment may be less when not required to support the plea of the statute of limitations interposed by one tenant in common in favor of another, and that in an action of ejectment it is sufficient to show that the defendant, either by his answer or by any other means, has denied the right of the plaintiff to share in the proceeds of the property, or has disputed his title, or in some other manner shown that any attempted entry upon the property by the plaintiff for the purpose of occupying it as a tenant in common would be resisted by the defendant: Phelan v. Smith, 100 Cal. 158; Cameron v. Chicago etc. Ry. Co., 60 Minn. 100; Feliz v. Feliz, 105 Cal. 1; Minton v. Steele, 125 Mo. 181; Odom v. Weathersbee, 26 S. C. 244.

Proof of Ouster, when not Required.—While an ouster is essential to the maintenance of an action of ejectment by one tenant in common against another, yet the circumstances of the case or the condition of the pleadings may be such as to concede the fact of ouster, and thus to dispense with proof of its existence. If the defendant by his answer claims the whole premises in his own right as owner thereof in severalty, he releases the plaintiff from the necessity of proving an ouster at the trial: Henderson v. Cotter, 15 U. C. Q. B. 345; Harrison v. Taylor, 33 Mo. 211; 83 Am. Dec. 159; Noble v. McFarland, 51 Ill. 229; Scott v. McLeod, 14 U. C. Q. B. 575; McCallum v. Boswell, 15 U. C. Q. B. 343; Allen v. Salinger, 103 N. C. 14; Southern etc. Co. v. Henshaw, 89 Ala. 448. "We incline strongly to the opinion that the denial in the defendant's answer of all right, title, and interest in the plaintiff is an admission that his own possession is adverse, and may, therefore, well be treated as equivalent to a confession of ouster, superseding the necessity of proof on the trial": Clason v. Rankin, 1 Duer, 341. The law of ouster, as between cotenants, was thus clearly and forcibly stated by Judge Scott in the supreme court of Missouri: "The law of ouster, in an action between cotenants, wherein the one denies that the other ever had any title to the disputed premises, must be the same as in an action between those who are connected by no such relation. If the defendant wanted the benefit of the facts assumed in her instruction, why in her answer did she not disclaim to hold adversely to the plaintiffs? She would in one breath deny that the plaintiffs are her cotenants, and in the other claim the benefit of the relation. Where one cotenant seeks to bar another on the ground of adverse possession, the law requires proof of unequivocal facts showing an actual ouster. So, where the title of plaintiff is not disputed by the defendant, and the case turns on the fact whether there has been a disseisin of one cotenant by another, the plaintiff must show an actual ouster, or that some act was done by the defendant amounting to a total denial of the right of the plaintiff as a cotenant. But, in an action where the cotenancy is denied ever to have existed, there is no reason

why stronger evidence of an ouster should be required of one claiming as cotenant than any other party. By filing such an answer as was put in in this case, an act was done which showed that the defendants made a total denial of the rights of the plaintiffs as cotenants": *Peterson v. Laik*, 24 Mo. 543; 69 Am. Dec. 441.

The Recovery of the Plaintiff must be Consistent with the Title upon Which it is Based. If he has an undivided interest, his recovery against another person having a like interest must not be for the possession of the lands in entirety, but that he be let into possession with the defendant: *Ewald v. Corbett*, 32 Cal. 499; *Tevie v. Hicks*, 38 Cal. 234; *Duncan v. Rodecker*, 90 Wis. 1. He is equally entitled to such joint possession, and equally denied the right to exclusive possession, whether his moiety is so large as to almost include the whole, or so small as to grow infinitesimal when compared with the entire tract. Therefore, so far as the judgment to be entered in an action of ejectment is concerned, the relative interests of the plaintiff and defendant are perfectly immaterial; but as this judgment may, and in all probability will, be succeeded by an action for mesne profits, it is proper for the court before which the ejectment suit is tried to ascertain and settle the respective interests of the parties: *Mahoney v. Middleton*, 41 Cal. 54.

Where the Interest of Plaintiff is Less than that Sued for.—The plaintiff may recover, though the interest which he establishes at the trial is different in quantity from that which he claimed in the declaration. If he declares for a specified, undivided interest, he may recover, though his evidence is for a much smaller interest: *Davis v. Whiteside*, 1 Bibb, 510; *Burges v. Purvis*, 1 Burr. 326; *Ablett v. Skinner*, 1 Sid. 303. The same rule probably prevails where plaintiff declares for the whole, in which case he may recover either the whole or any undivided moiety thereof, as he shall show himself entitled: *Lewis v. McFarland*, 9 Cranch, 151; *Gist v. Robinet*, 3 Bibb, 2; *Gray v. Givens*, 26 Mo. 303. From this last proposition the courts of Maryland, as well as some of the early decisions in New York, dissent. They hold that plaintiff "cannot recover an undivided part when he claimed an entirety, nor an entirety when he demands an undivided portion": *Carroll v. Norwood*, 5 Har. & J. 174; *Benson v. Musseter*, 7 Har. & J. 212.

Forcible Entry and Unlawful Detainer by One Cotenant Against Another.—It is said that a cotenant is liable in England to a criminal prosecution for forcibly ejecting or forcibly holding his companion out of possession. The supreme court of Illinois, at an early date, maintained that the object of the Forcible Entry and Detainer Act of that state was to create a civil remedy in all cases which, in England, would have sustained a criminal prosecution; and, therefore, that redress might be had in Illinois, under the act of that state, by one tenant in common, or joint tenant, against his cotenant, where the latter forcibly ousted the former: *Mason v. Finch*, 1 Scam. 495. A like conclusion had been reached a few years previously in the court of appeals of the state of Kentucky: *Eads v. Rucker*, 2 Dana, 111. The same rule prevails in Massachusetts: *Presbery v. Presbery*, 13 Allen, 281; also in California: *Bowers v. Cherokee Bob*, 45 Cal. 495. The judgment in such cases, like that in ejectment, "should be according to the right established for an undivided interest," i. e., it should authorize the putting of plaintiff into possession, but not the putting of defendant out of possession: *Eads v. Rucker*, 2 Dana, 111; *Presbery v. Presbery*, 13 Allen, 281; *Bowers v. Cherokee Bob*, 45 Cal. 495; *Jamison v. Graham*, 57 Ill. 97. If a lessee is also a cotenant at the termination of his lease, and, on that account, is entitled to remain in possession, he cannot be proceeded against under the act in reference to unlawful detainers, and thereby compelled to surrender the entire possession: *Henderson v. Allen*, 23 Cal. 519; *Lick v. O'Donnell*, 3 Cal. 59; 58 Am. Dec. 333. Acts giving double rent against a tenant holding over, after notice to quit, have been held to apply to a cotenant who, subsequent to the expiration of a lease from his companion, refused to let the latter into the possession: *Cutting v. Derby*, 2 H. Black. 1075, 1077; *Mumford v. Brown*, 1 Wend. 52; 19 Am.

Dec. 461. But the cotenant continuing in sole possession after the termination of the lease from his companion is not liable for rents, unless he does some act to prevent the latter from joining in the occupation: *Mumford v. Brown*, 1 Wend. 52; 19 Am. Dec. 461. But where one obtains possession under a lease from the other, he must, at the termination of the lease, surrender the possession which he acquired by it. If an action for an unlawful detainer is brought against him, he cannot successfully resist it by showing that the title was at the leasing, and still is, vested in himself and his lessor as tenants in common: *Hershey v. Clark*, 27 Ark. 528.

Trespass to Try Titles, like an action of ejectment, cannot be sustained by one tenant in common, or other cotenant, against one of his fellow-tenants, in the absence of an actual ouster: *Taylor v. Stockdale*, 3 McCord, 302; *Harvin v. Dodge*, Dudl. 23; *St. Louis etc. Co. v. Prather*, 75 Tex. 53.

CHAPMAN v. CHAPMAN.

[91 VIRGINIA, 397.]

VENDOR AND VENDEE.—THE POSSESSION OF A VENDEE who has paid the entire purchase price, and is entitled to a conveyance, cannot be regarded as adverse to his vendor. Before such possession can become adverse, the vendee must have dissevered the privity of title between him and his vendor by the assertion of an adverse right, and openingly and continuously disclaiming the title of the vendor, and have brought such disclaimer home to the latter or his successor in interest.

PURCHASERS FOR VALUE, WHO ARE.—Trustees to whom property has been conveyed for the benefit of creditors are purchasers for value.

NOTICE.—THE POSSESSION OF REAL PROPERTY by one who has purchased and paid for it, but has not received a conveyance of the legal title, is notice to the world of his right and claim. It is the duty of an intending purchaser to inquire into the fact of the possession of the property, and he will be affected with notice of whatever right or interest the party in possession may have which such inquiry would have disclosed.

ABANDONMENT OF LAND on the part of one who has purchased and paid for it, but has not received a conveyance of the title, is not inferable from his absence therefrom for a number of years.

NOTICE TO ONE OF TWO TRUSTEES, of an equitable title held by a third person to lands conveyed to them for the benefit of creditors, is notice to both.

CHANCERY PRACTICE.—THE ANSWER OF ONE OF TWO TRUSTEES who are charged with having notice of an outstanding equitable title when they received a conveyance of the property, when he does not claim to have any personal knowledge respecting the notice to his cotrustee, merely presents an issue throwing the burden of proof upon the complainant, but does not require him to overcome the denial of the answer by the testimony of two witnesses, or by one witness accompanied by strong, corroborating circumstances.

J. Catlett Gibson, for the appellant.

James Hay and T. C. Gordon, for the appellees.

398 RIELY, J. This is a controversy between the owner of the equitable title and the holders of the legal title to certain lands. Both claim under the same vendor.

The appellant, Bernard T. Chapman, claims the lands by 399 right of purchase, the payment of all the purchase money, and the delivery to him of the possession in pursuance of his purchase, although the title to the lands has never been conveyed to him.

Long after he had acquired the said lands, his father, Thomas W. Chapman, from whom he claims and in whom was the legal title, conveyed them, along with other lands belonging to him, to James Hay and Thomas A. Chapman, in trust to secure his creditors; and the trustees claim the lands in possession of the appellant as bona fide purchasers for value, without notice of any right in him to them.

The appellant bases his right to hold the lands on several grounds.

The first ground on which he relies is that of adverse possession under claim of title for more than fifteen years, the period of the statutory bar. This pretension, under the circumstances of this case, cannot be sustained. He purchased one part of the lands of his father in the year 1870, and acquired the other part in the year 1874, and took possession of each parcel at the time of the purchase, or very soon thereafter. He entered into possession of both parcels under his contracts of purchase. By such purchase, and the payment of the entire purchase money, he acquired the full equitable title, but such equitable title was derived from his vendor, who retained the legal title for future conveyance. In such case, the vendee cannot be said to hold adversely to his vendor: *Clarke v. McClure*, 10 Gratt. 305; *Creigh v. Henson*, 10 Gratt. 231; *Nowlin v. Reynolds*, 25 Gratt. 137. He holds in subordination to, and under the protection of, the title of his vendor, and no length of time is sufficient for such possession to ripen silently into a title by adverse possession. Such possession is in privity with, and in subserviency to, the legal title of his vendor, and he is not allowed to impeach or assail it. As was said by President Tucker in *Williams v. 400 Snidow*, 4 Leigh, 14, 20: "Adverse possession is not the mere holding over against the will of the party from whom you obtain the possession. It is the holding by claim of title, adverse to another's title, that constitutes adverse possession."

Before adverse possession can arise between a vendor and his

vendee, or between the grantee of the vendor and such vendee, where the vendor has retained the title, and the statute of limitations commences to run, the vendee must have dissevered the privity of title between them by the assertion of an adverse right, and openly and continuously disclaimed the title of his vendor, and such disclaimer be clearly brought home to the knowledge of the vendor or his grantee: *Creekmur v. Creekmur*, 75 Va. 430, 436; *Whitlock v. Johnson*, 87 Va. 323, 327. There has been no disavowal by the appellant of the title of his vendor, and the claim of adverse possession cannot avail him.

The next and main ground upon which the appellant relies is, that the trustees are not bona fide purchasers for value without notice. They are unquestionably, under many decisions of this court, purchasers for value: *Evans v. Greenhow*, 15 Gratt. 153; *Wickham v. Martin*, 13 Gratt. 427; *Exchange Bank v. Knox*, 19 Gratt. 739; *Shurtz v. Johnson*, 28 Gratt. 657, 667; *Cammack v. Soran*, 30 Gratt. 292; *Williams v. Lord*, 75 Va. 404; *Witz v. Osborn*, 83 Va. 230.

Are they bona fide purchasers without notice? The open and peaceable possession of land under a claim of right is notice to all the world of the right or claim of the person in possession; and, where one buys land in the possession of another than his vendor or grantor, he is bound to take notice of such possession and all that it imports. This is, we think, the rule to be deduced from the authorities. It is the duty of a purchaser to inquire into the fact of the possession, and ⁴⁰¹ he will be affected with knowledge of whatever right or interest the party in possession may have in the land which such inquiry would have disclosed. The rule has its foundation in the good faith of the purchaser. If he makes the inquiry, he would acquire knowledge of whatever right or claim, if any, the person in possession may have; and if, upon inquiry, he receives information of any right or interest of such person in the land, it would be mala fides to attempt to deprive him of it. So, if he fail to make inquiry, he has not discharged the duty which good faith imposed on him; and whatever knowledge he might have acquired by means of an inquiry duly and reasonably prosecuted the law imputes to him. The purchaser is, therefore, charged with notice of the possession, and of whatever right, interest, or claim the person in possession may have, when the party from whom he buys is not the person in possession of the land.

Such notice is the same in effect as the notice which is im-

puted by the recording or registry acts. One may purchase land to which another than his vendor has a deed of conveyance, or upon which he has a mortgage duly recorded, according to the statute for the recordation of deeds, but of which the purchaser knows nothing, yet he will be as conclusively charged with notice of such conveyance or mortgage as if he had examined the record and inspected the deed. He is required, for his own protection, to examine the records, and the law imputes to him all that such examination would have disclosed. Actual, notorious, and exclusive possession of land takes the place of the recordation of the instrument of title; and a subsequent purchaser of land in possession of one who is not his vendor is affected with notice of whatever claim or interest the person in possession has, and which an inquiry into the possession would have revealed. He is not permitted to dispute such right or interest, unless he has made the inquiry which equity and good conscience impose on him, and such ⁴⁰² inquiry, duly prosecuted, has failed to reveal any right or interest in the tenant in possession. This is the established doctrine both in England and in this country.

In the case of *Holmes v. Powell*, 8 De Gex, M. & G. 579, that eminent jurist, Lord Justice Knight Bruce, said: "I apprehend that by the law of England, when a man is of right and de facto in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, conflicting or inconsistent with the title or alleged title under which he is in possession, or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who knows, or cannot be heard to deny that he knows, another to be in possession of a certain property, cannot, for any civil purpose, as against him at least, be heard to deny having thereby notice of the title or alleged title under which, or in respect of which, the former is or claims to be in that possession": *Holmes v. Powell*, 8 De Gex, M. & G. 579.

The same general rule, based upon the same motives and reasons, is said by Pomeroy, in his work on Equity Jurisprudence, to be established in the United States by a very great number of decisions: See 2 Pomeroy's Equity Jurisprudence, sec. 614, and the cases cited in the note thereto in support of the text. The rule was recognized by this court in *Rorer Iron Co. v. Trout*, 83 Va. 397, 419; 5 Am. St. Rep. 285.

The doctrine has also recently been upheld by the court of

appeals of New York, in its fullest extent, in the case of Phelan v. Brady, 119 N. Y. 587. Phelan lent to one John Murphy the sum of two thousand dollars, and took from him a mortgage on a tenement or block, containing forty-three rooms or apartments, then occupied by twenty different occupants or families, as tenants from month to month, except that three of the apartments were occupied by Margaret Brady and her husband, who kept a liquor store in a part of the building, ⁴⁰³ and occupied two living rooms in the rear of the store. The wife claimed to be owner of the premises, and collected rents from the other tenants. Murphy had a perfect record title to the premises at the time Phelan lent to him the money and Murphy executed the mortgage to secure it; but he had never, in fact, any interest in the property, had never paid anything for it, was not in possession, and, before the execution of the mortgage, had conveyed it by deed to Mrs. Brady, who was the real owner. Her deed, however, was not recorded until several weeks after the recordation of the mortgage.

Phelan had no notice, at the time he made the loan to Murphy and took the mortgage, of any title to the premises in Mrs. Brady, or of any claim on her part to be the owner; but she was in the actual possession of the premises under a perfectly valid but unrecorded deed. In a contest between her and the mortgagee, Phelan, the court said: "Her title must, therefore, prevail as against the plaintiff. It matters not, so far as Mrs. Brady is concerned, that the plaintiff in good faith advanced his money upon an apparently perfect record title of the defendant, John E. Murphy. Nor is it of any consequence, so far as this question is concerned, whether the plaintiff was, in fact, ignorant of any right or claim of Mrs. Brady to the premises. It is enough that she was in possession under her deed and the contract of purchase, as that fact operated in law as notice to the plaintiff of all her rights. It may be true, as has been argued by the plaintiff's counsel, that when a party takes a conveyance of property situated as this was, occupied by numerous tenants, it would be inconvenient and difficult for him to ascertain the rights or interests that are claimed by all or any of them. But this circumstance cannot change the rule. Actual possession of real estate is sufficient notice to a person proposing to take a mortgage on the property, and to all the world, of the existence of any right which the person in possession is able to establish."

⁴⁰⁴ It was argued in *Edwards v. Thompson*, 71 N. C. 177, where the purchaser was a resident of South Carolina, and bought land in North Carolina, that the question of notice of an equity in derogation of the vendor's right to sell was exclusively one of fact, and that, in order to be fixed upon the purchaser, it must be shown, either that he had notice in fact, or else willfully or imprudently omitted to inquire when the means of inquiry were in his reach. "We do not think," said the court, "this is the true principle. On policy, the law avoids such minute and uncertain inquiries. It says that, if a contract of sale be registered, it is conclusive of notice, notwithstanding the purchaser lived in another state, and did not, in fact, search the register's books: 1 Story's Equity Jurisprudence, sec. 403. And on the same principle it follows that open, notorious, and exclusive possession in a person other than his vendor is a fact of which a purchaser must inform himself, and he is conclusively presumed to have done so."

It appears from the record that Thomas W. Chapman, for the purpose of raising the money to pay a pressing debt, on February 24, 1870, sold certain portions of his real estate to his sons, James C., Thomas A., and Bernard T. Chapman. Each was to pay five hundred dollars for the land he got, and this was done, they having borrowed the money for the purpose. The parcel of land bought by Thomas and Bernard was principally mountain land, and at first was held by them jointly.

In 1874, Thomas W. Chapman agreed to buy for his sons Thomas and Bernard the tract of land called the "Yowell land," which adjoined the land he had sold to them, but he did so in his own name. He retained about fifteen acres, to straighten his own lines, for which he allowed and paid seventy-five dollars, and they took possession of the residue of the tract, and paid the balance of the purchase money.

Thomas and Bernard afterward divided the lands between themselves so as to throw the share of each into one body, by ⁴⁰⁵ which division Bernard acquired all of the Yowell land except the fifteen acres retained by their father, and Thomas received about eighty or ninety acres of Bernard's part of the mountain land.

Subsequently, Thomas W. Chapman conveyed to his sons James C. and Thomas A. Chapman the lands they were respectively entitled to, but failed to make a deed to his son Bernard for his land; and on September 19, 1888, conveyed, among other

property, eight hundred and twenty acres of the land on Quaker Run, in Madison county, which included Bernard's part of the mountain land, and the whole of the Yowell land, to James Hay and Thomas A. Chapman, in trust to secure his creditors.

It is shown that Bernard took possession and control of his part of the mountain land in 1870, and of the Yowell land in 1874, as the owner thereof, in accordance with his purchase. He did not reside on the mountain land, as the house thereon had been burned, but in December, 1874, after the purchase of the Yowell land, he moved into the dwelling-house on it, and lived there with his wife and children, exercising acts of ownership over all of said lands, until the year 1881, when, his wife having died, leaving several small children, upon the advice of his brother, Thomas A. Chapman, he moved back to his father's home. During the years 1875 to 1881 he made valuable improvements upon the lands. He enlarged the dwelling-house by the addition of several rooms, and otherwise improved it. He erected a tenant's house, a large barn, a cornhouse, and made other improvements, at a total cost of about twelve hundred dollars.

After the death of his wife, and his removal with his children to his father's home, he rented out his lands to his father for several years, and worked for him for wages. In December, 1887, having in the mean time remarried, he moved back, and again took actual possession of his lands, and has ever since resided on them.

406 It thus appears that he was the full equitable owner of the lands by purchase and the payment of the entire purchase money, and was in open, peaceable, and exclusive possession of them at the time they were conveyed by his father to said trustees. Of this equitable estate the trustees are charged with notice. If they had made due inquiry, which his possession made it their duty to do, they would have learned the facts upon which his right of possession was based, and knowledge thereof is by the law imputed to them. They are not, therefore, bona fide purchasers without notice, and the appellant is entitled to hold the lands against them.

Stress was laid by the counsel for the appellees upon the absence of Bernard Chapman from the lands between 1881 and December, 1887. The fact of his absence, under the circumstances, does not alter the result. In reply to the argument of abandonment made in the case of *Holmes v. Powell*, 8

De Gex, M. & G. 579, it was said: "But possession of a corporeal hereditament, to be effectual, need not be continually visible or without cessation actively asserted. If a man has once received rightful and actual possession of land, he may go to any distance from it without authorizing any servant, or agent, or other person to enter upon it or look after it, may leave it for years uncultivated and unused, may set no mark of ownership upon it, and his possession may, nevertheless, still continue; at least, unless his conduct afford evidence of intentional abandonment, which such conduct as I have mentioned would not necessarily do."

There is no evidence here of intentional abandonment or surrender of his right to the lands. Although he did not reside on them during the period mentioned above, he nevertheless exercised the right of ownership over them by renting them out to his father. And, besides, the vital question is, Was he in possession of the lands under a claim of right at the time they were conveyed to the trustees? 2 Pomeroy's Equity Jurisprudence, sec. 622. Of this the evidence admits of no doubt.

407 Thomas A. Chapman was not only affected with constructive notice of the right of Bernard Chapman by reason of the latter's possession of the lands, but the record discloses that he had that which was superior to notice, and which notice was intended to supply. He had knowledge. He knew that he and Bernard had jointly purchased their lands of their father and divided the same between them. He knew that Bernard, as well as he, had paid for his part. He knew that Bernard had entered into possession of it under his contract of purchase, had put valuable improvements upon it, and was the real equitable owner. And he knew that he was in possession and living upon the lands when the deed of trust was executed. What was the effect of his knowledge on the title of himself and his cotrustee under the deed of trust? Did it make them both purchasers with notice? The conveyance was to them jointly. The particular estate they took was joint and inseverable; the title joint and indivisible. To be bona fide purchasers without notice, they must be wholly so. There can be no such thing as a purchase partly bona fide. If tainted in part, the whole is infected. Consequently, notice to one of two or more trustees is notice to all: *Le Neve v. Le Neve*, 2 White and Tudor's Leading Cases in Equity, pt. 1, p. 109; *Smith v. Smith*, 2 Crompt. & M. 230; *Meux v. Bell*, 1 Hare, 73; *Willes v. Greenhill*, 4 De Gex, F. & J. 147, 150; *Bank*

of *United States v. Davis*, 2 Hill, 453, 464; *Myers v. Ross*, 3 Head, 59; 2 *Pomeroy's Equity Jurisprudence*, sec. 667; *Lewin on Trusts*, 609-612.

It is claimed by counsel for the appellees, upon the authority of *Morrison v. Bausemer*, 32 Gratt. 225, and *Johnson v. National etc. Bank*, 33 Gratt. 473, that such knowledge must have been present to the mind of Thomas A. Chapman at the time the deed of trust was executed, in order to affect the title in him and his cotrustee, ⁴⁰⁸ and fix notice of the prior encumbrance upon the beneficiaries of the trust.

In the case at bar, the bill expressly charges that Thomas A. Chapman had, "at all times," actual notice of Bernard Chapman's claim and right to the land. He filed no answer to the bill, though his cotrustee did, denying the allegations of the bill. He did not claim to have, nor does it appear that he could have had, personal knowledge of the facts relating to the claim of Bernard Chapman to the land. The effect of his answer was, therefore, merely to present an issue and throw the burden of proof on the complainant. It could have no further weight. It is not required in such case that the denial of the answer shall be overcome by the testimony of two witnesses, or the testimony of one witness accompanied by strong corroborating circumstances: *Dutilh v. Coursault*, 5 Cranch C. C. 349; *Lawrence v. Lawrence*, 21 N. J. Eq. 319; *Pennington v. Gittings*, 2 Gill & J. 208; *Deimel v. Brown*, 136 Ill. 586; *Lattomus v. Garman*, 3 Del. Ch. 232; *Watson v. Palmer*, 5 Ark. 501; *Combs v. Boswell*, 1 Dana, 473; 1 *Daniell's Chancery Practice*, 846, and note thereto; 1 *Encyclopedia of Pleading and Practice*, 947, and cases there cited. Thomas A. Chapman testified in the cause, and it abundantly appears from his deposition that the facts relating to Bernard Chapman's right to the land were distinctly remembered by him; and, from all the circumstances, we cannot doubt that such was the case.

For the foregoing reasons, the decree of the circuit court of Madison county must be reversed.

The beneficiaries under the deed of trust were not made parties to the suit, and it is proper to add that it is not intended that they should, as they could not, be concluded by this decision. The court below passed directly on, and adversely to, the right of Bernard Chapman to the lands, and ⁴⁰⁹ this was the subject of the appeal here. The counsel for the appellees made no objection for the want of proper parties, and the appellant, who was

the plaintiff in the court below, could not complain of his own omission. Under these circumstances, and for the reason that counsel seemed to desire that we do so, we have proceeded, in the absence of the beneficiaries as parties, to consider and pass upon the legal questions involved in the appeal.

Reversed.

ADVERSE POSSESSION.—A VENDEE IN POSSESSION of land under a contract to purchase, who has paid the entire purchase money, holds adverse possession, as against his vendor, from the time that such payment was made: *Newsome v. Snow*, 91 Ala. 641; 24 Am. St. Rep. 934, and note.

VENDOR AND PURCHASER—BONA FIDE PURCHASERS.—ASSIGNEES FOR BENEFIT OF CREDITORS of a fraudulent purchaser of goods are not bona fide purchasers of goods within the meaning of the rule: Extended note to *Williams v. Merle*, 25 Am. Dec. 614.

VENDOR AND PURCHASER—NOTICE OF OCCUPANT'S RIGHTS.—A purchaser of real property in the actual possession and occupancy of another is charged with notice of any right, title, or interest which the occupant has in such property: *Pleasants v. Blodgett*, 39 Neb. 741; 42 Am. St. Rep. 624, and note.

ABANDONMENT DEFINED.—Abandonment may be defined to be the actual leaving of property with the intention of relinquishing all claim or right thereto. To constitute abandonment, therefore, there must be the concurrence of the intention to abandon and the actual relinquishment of the property, so that it may be appropriated by the next comer: Extended note to *Wyman v. Hurlburt*, 40 Am. Dec. 464.

NORFOLK & WESTERN RAILROAD Co. v. HARMAN.

[91 VIRGINIA, 601.]

WHEN A RAILROAD COMPANY HOLDS ITSELF OUT AS A CARRIER OF LIVESTOCK, the law imposes upon it the duty to provide suitable and safe facilities, such as yards or pens, both at the place of shipment and the place of destination, for receiving and discharging the livestock offered it for shipment over its road.

A CARRIER OF LIVESTOCK, WHO PERMITS THE PEN in which it must be placed for loading, to have in it salt water accessible to such stock, and from the drinking of it they will probably sicken and die, is answerable for the damages suffered on that account by a shipper.

A CARRIER OF LIVESTOCK is not exempt from liability for injuries suffered by its failing to furnish and maintain suitable facilities for receiving such stock, by a provision in the contract of shipment declaring that it is not to be liable for any injury of the stock until it is loaded on the car, and the car duly fastened and secured by the conductor. It cannot, by contract, exempt itself from liability for negligence.

PRINCIPAL AND AGENT, WHO ARE NOT.—Vendors of livestock, who deliver it in a pen of a railway corporation for shipment, according to the stipulations of their contract of sale, are not, in so doing, agents of the purchasers, so that the latter are chargeable with the contributory negligence of the former in not discovering that such pen contained salt water in such quantity and condition as to be dangerous to such stock.

Bolling & Stanley, for the plaintiff in error.

James L. White and B. F. Buchanan, for the defendants in error.

⁶⁰² RIELY, J. The defendants in error, on June 13, 1891, delivered to the Norfolk and Western Railroad Company two lots of lambs to be transported to Jersey City, in the state of New Jersey. One lot was received by the railroad company at its station at Saltville, Virginia, and the other lot at Pounding Mill, in Tazewell county, Virginia. A large number of the lambs having died on the route, the owners charged that their death was caused by the negligence of the railroad company, and brought suit to recover damages for the loss sustained.

The railroad company having undertaken to furnish a stockpen at Saltville for the purpose of enabling shippers of livestock to load the same upon its cars, its negligence upon which the plaintiff's right of action was founded, consisted, it was alleged in the declaration, in not furnishing a suitable stockpen and maintaining it in a good and safe position, but permitting salt water or brine, which was poisonous and dangerous to stock when drunk by them, to be in the pen, whereby the lambs had access to and drank of it, and sickened and died.

When a railroad company holds itself out as a carrier of livestock, the law imposes upon it the duty to provide suitable and safe facilities, such as yards or pens, both at the place of shipment and the place of destination, for receiving ⁶⁰³ and discharging the livestock offered to it for shipment over its road: Covington Stock Yards Co. v. Keith, 139 U. S. 128; 23 Am. & Eng. Ency. of Law, 902. It appears from the certificate of the evidence that the railroad company did provide at its station at Saltville, from which one of the lots of lambs were shipped, a stockpen and a forcepen, to enable shippers of livestock to load the stock on their cars. In the stockpen was a culvert, which was made to convey the water from a fresh water spring, and about one-third of the culvert, at each end, was broken in and uncovered. There was a tank of salt water on the hillside above the pen, from which the salt water escaped and flowed into the pen, and into the culvert. Many of the lambs, when put into the pen to be loaded, although the loading was done as rapidly as possible, drank of the salt water, in spite of the efforts of the men engaged in loading them to prevent it.

It is shown by the evidence that Harman & Crockett had

bought the lambs from persons in the surrounding country, who delivered the lambs at the railroad station for shipment, and that Harman & Crockett knew nothing of there being salt water in the pen, until they learned the fact after the disaster that had happened to their stock; but it was known by the railroad company's agent at its station at Saltville.

The lambs, which were shipped from Saltville, left there on the cars about 5 o'clock in the afternoon, and arrived at Lynchburg at 11 o'clock the next morning. Mr. Crockett, one of the owners, met them at Lynchburg, and had them unloaded for the purpose of feeding and watering them.

He fed them some hay, but, finding them very thirsty and feverish, he turned the water off, and they got very little, if any, at that point. They arrived at Baltimore the next day, when they were found to be still so very thirsty that they could hardly be gotten away from the water, and were in bad condition, ⁶⁰⁴ and looking as if sick. When they arrived at Baltimore, the two lots were unloaded and turned into the feedingpens together, and became intermingled. At Baltimore, they commenced to die, and by the time they arrived at Jersey City, the next day, eighty-five had died on the route, sixty-one more died the following night, and others were sick, which very materially affected the sale of those that had survived.

It appears from the certificate of the evidence, as testified to by men of large experience in the livestock business, that it is dangerous to animals to give salt to them and then let them have free access to water; that the salt creates an intense thirst, which causes the animals—especially lambs—to drink immoderately of the water, the effect of which is to produce sickness, from which they are liable to die.

It being proved that the stockpen at its station at Saltville was the means provided by the railroad company to enable shippers to load their livestock on its cars, and that it permitted salt water to be in the pens, accessible to the lambs, the company had not performed its legal duty to furnish and maintain suitable and safe facilities to shippers for receiving their stock for shipment. It was, therefore, guilty of negligence, and liable to the plaintiffs for such loss as was caused by its negligence.

It appearing from the evidence that salt water is dangerous to livestock, when drunk by them; that it was in the stockpen at Saltville, into which the lambs had to be driven for the purpose of loading them on the cars; that the lambs, while being

loaded; drank of it; that they were in good condition when put into the cars; and that they soon thereafter became very thirsty and feverish, and affected like stock that had been made sick by drinking water, after being salted—the jury were clearly justified in finding that this was the cause of their death.

605 It was argued by the plaintiff in error that it assumed no other liability than the safe carriage and delivery of the stock to its connecting line at Lynchburg, that it did this, and that its liability then ceased. This defense cannot avail, for the evidence shows that the injury was done at Saltville, the shipping point, and in the pen it had provided to enable shippers to load their stock in its cars.

It was also urged that, under the printed contract of shipment, the railroad company was not responsible for any injury to the stock until they were "loaded into the car, and the car door fastened or secured by the conductor." It failed, as we have seen, to furnish and maintain suitable facilities for receiving the livestock, of which it held itself out as a public carrier. Such failure was negligence, and a common carrier cannot contract for exemption from liability for injury or loss caused by its own neglect: Code, sec. 1296; *Virginia etc. R. R. Co. v. Sayers*, 26 Gratt. 328. See, also, *Clarke v. Rochester etc. R. R. Co.*, 14 N. Y. 570; 67 Am. Dec. 205, and the valuable note thereto.

It was further claimed that even if it was negligence in the railroad company to permit salt water to be in the pen which it had provided to enable shippers of livestock to load their stock in its cars (and the only means which it had furnished for that purpose), yet that the plaintiffs were guilty of contributory negligence in allowing the lambs to get to the water while being loaded, and they cannot recover. The evidence satisfactorily establishes the negligence of the railroad company, and that the loss sustained by the plaintiffs was due to such negligence. Contributory negligence, to defeat a recovery, must be satisfactorily and affirmatively shown. Unless it appear from the plaintiffs' evidence, it devolves on the defendant to prove it. Contributory negligence on the part of the plaintiffs nowhere appears.

606 There is no evidence whatever that they knew of the existence of salt water in the loading pen, and it is not even pretended that they had any actual knowledge of it, but it is claimed that the men who brought the lambs to the station

became aware of it. This is true, and the evidence shows, also, that they used every effort to prevent the lambs from drinking the water. The fact that they learned of the presence of the salt water in the pen does not fix contributory negligence upon the plaintiffs. The men who delivered the lambs at the station, and put them in the cars, were not the employes of the plaintiffs. They were the persons from whom Harman & Crockett had bought the stock to be delivered to the railroad for shipment. In making the delivery, they were in no sense the agents of the plaintiffs. They were simply fulfilling their part of the contract of sale.

Therefore, their knowledge was not the knowledge of the plaintiffs, and could not be imputed to them. The doctrine of constructive notice by agency does not apply. The defense of contributory negligence is not sustained. On the trial, the jury found a verdict in favor of the plaintiffs for seven hundred and forty-two dollars, with interest thereon from June 17, 1891. The defendant company moved the court to set aside the verdict, but the court refused to do so, and gave judgment thereon. It was proved that the lambs would average about seventy-seven pounds each, and that they were worth in the New York market—the place where they were to be sold—from seven and a half to eight cents per pound. One hundred and forty-seven died before they could be gotten to market. It is an easy calculation to show that, exclusive of any compensation for those that were sold as “sick lambs,” the amount of the verdict of the jury was rather below, than above, the actual damages sustained by the defendants in error.

And the evidence was ample to sustain the charge of the ~~607~~ plaintiffs in the suit that the loss they had sustained was due to the negligence of the railroad company. The court rightly overruled the motion for a new trial.

There is no error in the judgment appealed from, and same must be affirmed.

CARRIERS OF LIVESTOCK—DUTIES OF.—Where it is found that cattle being transported in a railroad car with hogs are suffering, the conductor of the train is not justified in refusing, upon the shipper's request, to lay out the car at a station merely because the stockpen at that station is unsafe for hogs, it not appearing that the cattle could not be separately unloaded, or that the company was under no duty of having a pen safe for hogs as well as cattle: *Johnson v. Alabama etc. Ry. Co.*, 60 Miss. 191; 30 Am. St. Rep. 534. A railway company carrying livestock must provide suitable places where they can be fed and watered in every kind of weather, without injury, so far as this can be

done by the use of proper care: *International etc. Ry. Co. v. McRae*, 82 Tex. 614; 27 Am. St. Rep. 928, and note.

CARRIERS OF LIVESTOCK—STIPULATION FOR EXEMPTION FROM LIABILITY FOR NEGLIGENCE.—Railroad corporations engaged in carrying livestock cannot, by contract, exempt themselves from liability for their own negligence: *Railroad v. Dies*, 91 Tenn. 177; 20 Am. St. Rep. 871, and note; *Gulf etc. Ry. Co. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494, and note. See, also, the extended note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 213-217.

LYNCHBURG NATIONAL BANK v. SCOTT.

[91 VIRGINIA, 652.]

USURY.—THE DEFENSE of usury cannot be asserted against a bona fide holder of a note received in due course of business, without notice of any taint of usury, and at a lawful rate of discount, where the statute of the state controlling the subject merely declares that all contracts for a loan of money at a greater interest than allowed by law should be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned.

NEGOTIABLE INSTRUMENTS, THOUGH FOUNDED UPON AN ILLEGAL CONSIDERATION, are enforceable by bona fide holders for value.

THE DEFENSE OF USURY cannot be maintained against a bona fide holder of a negotiable instrument, acquired before maturity, for value, unless the statute declares such instrument to be void.

Honaker & Hutton and White & Penn, for the plaintiff in error.

Daniel Trigg, for the defendants in error.

653 **HARRISON, J.** This was an action at law instituted in the circuit court of Washington county, in December, 1893, by the Lynchburg National Bank against Scott Brothers, upon a negotiable note for \$1,000, bearing date June 3, 1893, executed by Scott Brothers, and payable four months after date to S. L. Scott, at the bank of Abingdon, Virginia, indorsed by S. L. Scott and the Bank of Abingdon, and discounted by the Lynchburg National Bank. The note sued on is the last of a series of renewals of a similar note discounted by the Bank of Abingdon, December 17, 1888, at an usurious rate of interest, the usurious interest paid said bank aggregating the sum of \$506.38. The plaintiff bank discounted the note sued on before maturity, in the due course of business, at six per cent interest, without any notice of any fact connected with its history, or of any illegality which affected it in the hands of antecedent parties. Before the maturity of the note sued on, the Bank of Abingdon made a general deed of assignment for the benefit of all of its creditors.

Among the defenses set up by the defendants, Scott Brothers, was that of usury, and all questions of law and fact were, by agreement, submitted to the court, which gave judgment for the plaintiff in the sum of \$1,002.25, the principal of said note and charges of protest, subject to a credit of \$506.38, with interest on the balance from the date of said judgment. Objections to the rulings of the circuit court, adverse to the plaintiff, being regularly saved by bills of exceptions, application was made to this court for a writ of error, which was granted.

In the petition, the plaintiff assigns four grounds of error, all raising questions of far more than ordinary interest. In the view, however, taken of the case by this court, it becomes necessary to consider but one, and that is, Can the defendants, Scott Brothers, in this action, avail themselves of the defense ⁸⁵⁴ of usury against the plaintiff bank, a bona fide holder of the note sued on, for value and without notice of any taint of usury, and received in the due course of business, before maturity, and at a legal rate of discount?

The statute of Virginia (Code, sec. 2818) provides as follows: "All contracts and assurances, made directly or indirectly for the loan or forbearance of money, or other thing, at a greater rate of interest than is allowed by the preceding section, shall be deemed to be for an illegal consideration, as to the excess beyond the principal amount so loaned or forborne." This section of the code is in the words of the act as passed March 24, 1874, and has been the law in Virginia since that date. By the terms of the statute which was in force in this state prior to April 1, 1873, all contracts and assurances for the loan or forbearance of money founded upon an usurious consideration were declared to be void. The question to be considered is the effect, as to negotiable instruments, of this change in the statute, declaring that such contracts shall be deemed to be for an illegal consideration, instead of void, as formerly.

These are not meaningless words, and it cannot be doubted that the legislature had some wise purpose in adopting the one, rather than the other, form of expression.

The purchaser or holder of a negotiable instrument, who has taken it bona fide, for a valuable consideration, in the ordinary course of business, when it was not overdue, without notice of its dishonor, and without notice of facts which impeach its validity as between antecedent parties, has a title unaffected by those facts and may recover on the instrument, although it may be without

any legal validity as between the antecedent parties: 1 Daniel on Negotiable Instruments, sec. 769, p. 576.

I believe the foregoing strong statement of the favor with which negotiable instruments are regarded by the law is universally accepted as sound. So far as I have been able to ~~see~~ examine the authorities, there is but one exception to the rule just laid down, and that is when the statute renders such instruments void. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect. The same author says: "When the statute merely declares, expressly or by implication, that the consideration shall be deemed illegal, the bill or note founded upon such consideration will be valid in the hands of the bona fide holder without notice, but the burden of proof will be upon the plaintiff, when the illegal consideration appears, to show that he is a bona fide holder without notice." In sections 807 and 808, the same author says: "In many localities, negotiable instruments, executed upon gaming or usurious considerations, are upon the same footing as those executed for other illegal considerations; that is, void between the parties, but valid in the hands of a bona fide holder"; and that, "when the instrument was executed upon an illegal consideration, especially if illegal by statute (but not absolutely avoiding the instrument), it throws upon the holder the burden of proving bona fide ownership for value. . . . and in all cases where the statute does not declare the instrument void, bona fide ownership for value being proved, the holder is entitled to recover."

Story on Promissory Notes, third edition, section 192, says: "The same doctrine will certainly apply to all cases of a bona fide holder for value without notice before it becomes due, where the original note, or the indorsement thereof, is founded on an illegal consideration, and this, upon the same general ground of public policy, is without any distinction between a case of illegality founded on moral crime or turpitude, which is malum in se, and a case founded on the positive prohibition of a statute, which is malum prohibitum; for, in each ~~case~~ case, the innocent holder is, or may be, otherwise exposed to the most ruinous consequences, and the circulation of negotiable instruments would be materially obstructed, if not totally stopped. The only exception is, where the statute creating the prohibition

has, at the same time, either expressly or by necessary implication, made the instrument absolutely void in the hands of every holder, whether he has such notice or not."

In note 4 to 3 Kent's Commentaries, eleventh edition, page 100, it is said: "If a note is not declared void by statute, mere illegality in its consideration will not affect the rights of a bona fide holder for value": Citing *Norris v. Langley*, 19 N. H. 423; *Converse v. Foster*, 32 Vt. 828; *Johnson v. Meeker*, 1 Wis. 436.

The principles in the foregoing text-books are sustained by the following adjudicated cases: *Glenn v. Farmers' Bank*, 70 N. C. 191; *Paton v. Coit*, 5 Mich. 505; 72 Am. Dec. 58; *Hay v. Ayling*, 16 Ad. & E. side page 423; *Vallett v. Parker*, 6 Wend. 615; *Oates v. National Bank*, 100 U. S. 239, 249, 250; *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 28.

In the case of *Converse v. Forster*, 32 Vt. 828, cited in note 4 to Kent's Commentaries, eleventh edition, page 100, Judge Poland says: "The English statute against usury and gaming not only imposes a penalty for such illegal acts, but expressly declares that all notes, bills, bonds, and other securities given for such illegal consideration shall be utterly void. All the cases that have been cited, and all that can be cited, so far as we know, both English and American, upon this subject, turn upon this very distinction and difference between the statutes. In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, void, the defendant may insist on such illegality, though the plaintiff, or such other party between him and the ⁶⁵⁷ defendant, took the bill or note bona fide, and gave a valuable consideration for it. But, unless it has been so expressly declared by the legislature, illegality of consideration would be no defense to an action at the suit of a bona fide holder for value without notice of the illegality."

"If the statute declares a security void," says Judge Rodman, in the case of *Glenn v. Farmers' Bank*, 70 N. C. 191, "then it is void in whomsoever's hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal by common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or one claiming through him. The case of *Hay v. Ayling*, 16 Ad. & E. 423, above cited, is a notable illustration of the difference. Gaming securities were declared void by 9 Anne, chapter 14, section 1, and it was held that

they were void in the hands of a bona fide innocent indorsee. The act of 5 and 6 William, chapter 41, section 1, modified the act of Anne, and declared they should be illegal. The court held that, after that act, they could be recovered on by an innocent holder."

Mr. Justice Story, in the case of *Fleckner v. Bank of the United States*, 8 Wheat. 338, in delivering the unanimous opinion of the court, says: "The statutes of usury of the states, as well as of England, contain an express provision that usurious contracts shall be utterly void; and, without such an enactment, the contract would be valid, at least in respect to persons who are strangers to the usury."

In *Vallett v. Parker*, 6 Wend. 615, Chief Justice Savage said: "Wherever the statute declares notes void, they are and must be so in the hands of every holder; but, where they are adjudged by the court to be so, for failure of, or the illegality of, the consideration, they are void, in the hands of the original ~~ess~~ parties, or those who are chargeable with or have had notice of the consideration."

In *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 28, Mitchell, judge, says: "The authorities justify the statement that a defendant may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the legislature that the illegality insisted upon shall make the security, whether contract, bill, or note, void. . . . But unless the legislature has so declared, then, no matter how illegal or immoral the consideration may be, a commercial note in the hands of an innocent holder for value will be held valid and enforceable": Citing a number of authorities.

This court in *Branch v. Commissioners of Sinking Fund*, 80 Va. 427, 56 Am. Rep. 596, says that a note in the hands of the maker, before delivery, is not property, nor the subject of ownership as such; that it must be issued or delivered by the maker before any one can become the bona fide holder of it. This view is not in conflict with the position taken here, where the question being considered is the difference between contracts declared by the statute to be void and those declared to be for an illegal consideration, and where the note sued on was issued and delivered by the maker. Nor are the authorities quoted to sustain the conclusion here reached in conflict with the view expressed in

Branch v. Commissioner of Sinking Fund, 80 Va. 427; 56 Am. Rep. 596.

If the word "illegal" were construed to mean "void," as contended for by the learned counsel for the appellees, the change in the statute would be meaningless. A glance at the history of the statute makes it clear that the legislature had an object in its change. The revisors of the code of 1849 recommended that what is now section 2818 should be adopted by the legislature. The legislature, however, refused to adopt the report of the revisors, and the law still declared all usurious ⁶⁵⁹ contracts void until the law was modified, and declared that they should be void only as to the interest in excess of six per cent per annum; but the legislature of 1874 declared that it should be deemed to be for an illegal consideration as to the excess beyond the principal sum loaned or forborne.

Commercial paper has ever been regarded with favor by the law, and in view of its growing importance, and its universal convenience in the affairs of men, it is not strange that the law-maker, in the interest of wise public policy, should desire to exempt such paper, in the hands of a bona fide holder for value, and without notice, from the hazard and uncertainty to which it was subjected by the law, under a statute which declared the usurious contract void. But, whatever may have been the motive of the legislature in making this change, it is the duty of the court to enforce the law as it is made.

And it is perfectly clear, upon reason and authority, that, no matter how illegal the consideration may be, a negotiable note in the hands of a bona fide holder for value without notice will be held valid and enforceable.

If the maker of a negotiable note contests the right of one who has acquired it by indorsement, for value, before maturity, and without notice of any defense, to recover of him the amount of the note, he must, to prevail, be able to show a statute that in express terms, or by necessary implication, declares the note to be void.

The agreed statement of facts in this case shows that the plaintiff in error discounted the note sued on before maturity, and in the due course of business, at six per cent interest; that the plaintiff in error had no notice or knowledge when it discounted the note that it was a renewal of any other note, or that it had ever theretofore been discounted by the Bank of Abingdon, or

that anyone had at any time received from the defendants in error usurious interest thereon.

The statute (Code, sec. 2818) declaring that all usurious contracts ^{see} shall be deemed to be for an illegal consideration as to the interest, instead of void, as formerly, it follows, from what has been said, that the defendants in error could not avail themselves of the defense of usury to defeat the plaintiff bank of its recovery of the note sued on, or any part thereof.

The judgment of the circuit court being in conflict with this opinion, it must be reversed and set aside, and this court will enter such judgment as the said circuit court ought to have entered.

Reversed.

NEGOTIABLE INSTRUMENTS—USURY—RIGHTS OF BONA FIDE HOLDERS.—If a promissory note is given for a usurious contract, it is absolutely void, even in the hands of an innocent holder who received it in the fair and regular course of the trade, without knowledge of the usury: *Wilkie v. Roosevelt*, 3 Johns. Cas. 206; 2 Am. Dec. 149; *Ayer v. Tilden*, 15 Gray, 178; 77 Am. Dec. 355, and note. A note indorsed for the maker's accommodation and discounted at unlawful interest is usurious and void against the maker and indorser, even in the hands of an innocent indorsee: *Fleming v. Mulligan*, 2 McCord, 173; 18 Am. Dec. 707, and note. That the plaintiffs were innocent indorsees is not sufficient to purge the contract of usury: *Solomons v. Jones*, 3 Brev. 54; 5 Am. Dec. 538. The defense of usury to a note given for a usurious consideration is cut off by an indorsement thereof, before maturity, to a bona fide purchaser without notice: *Woodworth v. Huntoon*, 40 Ill. 131; 89 Am. Dec. 340, and note. A note sold at greater discount than the legal interest does not thereby become usurious, if the payee has received it in a business transaction: *Ramsey v. Clark*, 4 Humph. 244; 40 Am. Dec. 645, and note. A bona fide purchaser without notice under a sale made by virtue of a power of attorney contained in a mortgage is not affected by usury in the original contract: *Jackson v. Harvey*, 10 Johns. 185; 6 Am. Dec. 328.

NEGOTIABLE INSTRUMENTS—CONSIDERATION—RIGHTS OF BONA FIDE HOLDERS.—Want of consideration for a promissory note is no defense in a suit thereon against a bona fide indorsee, without notice and before maturity: *Hascall v. Whitmore*, 19 Me. 102; 36 Am. Dec. 738. The rights of a bona fide payee are not affected by the fact that the note was taken in payment of an old note which was not surrendered until some time after the receipt of the new note, and this will not let in defenses unknown to him when he received the note: *Dixon v. Dixon*, 31 Vt. 450; 76 Am. Dec. 128. A note given in consideration of a gaming contract is void in the hands of an innocent holder by indorsement, for value, before due, and without notice of the illegality of the consideration: *Snoddy v. Bank*, 88 Tenn. 573; 17 Am. St. Rep. 918; compare *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23. See, also, the extended notes to *Sims v. Lyles*, 26 Am. Dec. 156-158, and *Bedell v. Herring*, 11 Am. St. Rep. 310.

PITSNOGLE v. COMMONWEALTH.

[91 VIRGINIA, 808.]

IDEM SONANS.—If two names may be sounded alike without doing violence to the power of the letters found in the variant orthography, the variance is immaterial. Therefore, an indictment for stealing a watch from Edmond Bolden may be supported by evidence of its theft from Ed. Bolen.

LARCENY.—**PROOF THAT A GOLD WATCH** was stolen is made out by evidence that the owner gave thirty dollars for it, and that it was represented, when he purchased it, as a gold watch.

LARCENY.—**PROOF OF EMBEZZLEMENT** will, under the statutes of Virginia, sustain a common-law indictment for larceny.

LARCENY BY BAILEE.—Proof that the defendant, after receiving a watch as security for a loan, appropriated it to his own use, and by falsely and fraudulently substituting another and different paper from the one given by him to his bailee, he attempted to vest the property in himself as owner, sustains his conviction of the larceny of such watch.

James T. Hinton, for the plaintiff in error.

Attorney General R. Taylor Scott, for the commonwealth.

808 KEITH, J. E. D. Pitsnogle was indicted in the Hustings court of the city of Roanoke for the larceny of a gold watch, of the value of thirty dollars, the property of Edmond Bolden. For this offense he was, at a subsequent term, tried before a jury, found guilty as indicted, and his punishment fixed at fifteen days in jail and a fine of fifteen dollars.

The first assignment of error is, that the court erred in overruling the demurrer of petitioner to the indictment. The indictment is in the usual form, and this objection cannot be sustained.

The second error assigned is, that the court erred in overruling the defendant's motion to set aside the verdict, on the ground that it was contrary to the law and evidence: 1. Because, as it is alleged, there is a variance between the allegations of the indictment and the proof, inasmuch as the indictment states that the watch was stolen from "Edmond Bolden," while the evidence is, that the party whose property was stolen was named "Ed. Bolen." The rule, as stated in 1 Bishop on Criminal Procedure, section 689, is, that "if the names may be sounded alike without doing violence to the power of the letters found in the variant orthography, the variance is immaterial."

In the sixteenth volume of the American and English Encyclopedia of Law, page 126, it is said "that whether or not two or more names are idem sonans may be determined by the court upon a mere comparison, where the issue is free from doubt; but

the modern and approved practice is to submit the question to a jury, whenever there is an opportunity to do so, and where the correct sound appears at all doubtful or dependent upon particular circumstances." In our judgment, the court might very safely have disposed of this objection without the assistance of the jury, but as it seems to have taken the even more unexceptional mode of determining the question, that of leaving ^{§10} it to the jury, the result is still less the subject of complaint or of error.

It is alleged in the indictment that a gold watch was stolen, and it is claimed that there is no proof that it was of gold. Bolen, its owner, testifies that he gave thirty dollars for the watch; that it was represented, when purchased by him, as a gold watch; and while there was no analysis or chemical test as to the metal of which it was made, this evidence would seem to be sufficient to justify the verdict of the jury upon this point.

The petitioner, however, relies more particularly upon the fact that the commonwealth has failed to show the essential elements which constitute the crime of larceny. Much of the oral argument was devoted to the attempt to show that proof of embezzlement would not sustain a common-law indictment for larceny. Whatever doubt may have existed upon this subject formerly, and however the rule may be in other courts, it is too well established in Virginia to be any longer the subject of controversy. Section 3716 of the code says that if "any person . . . embezzle . . . any money, note, bill, check, order, draft, bond, receipt, bill of lading, or any other property which he shall have received for another . . . he shall be deemed guilty of the larceny thereof." In sections 3714 and 3722 identical language (*mutatis mutandis*) is used with respect to receiving stolen goods and obtaining money under false pretenses. In *Anable v. Commonwealth*, 24 Gratt. 563, it was held that, upon an indictment for larceny, proof that the accused obtained money by false pretenses would sustain the indictment. It was argued there that the statute declaring that a person who obtained money or other goods under false pretenses should be declared guilty of larceny ought to be construed as fixing the punishment of the offense, and not as changing the mode of the procedure or the form of the indictment; but Judge Christian in his opinion said: "Whatever may be the view of the court upon that ^{§11} question, as an original proposition, it cannot now be reopened, and must be considered as *res adjudicata*."

This principle was settled in *Dowdy v. Commonwealth*, 9 Gratt. 727; 60 Am. Dec. 314; was followed in *Leftwich v. Commonwealth*, 20 Gratt. 716, and *Walker v. Pierce*, 21 Gratt. 722, thus fixing the judicial interpretation of the statute. Since then it has been followed in *Fay v. Commonwealth*, 28 Gratt. 912, in *Dull v. Commonwealth*, 25 Gratt. 965, and in *Shinn v. Commonwealth*, 32 Gratt. 899. The laws of Virginia have, since these decisions, been codified, and the statutes in question re-enacted with this interpretation of the courts impressed upon them, and it must, therefore, now be considered as the settled law of this state that, upon an indictment simply charging larceny, the commonwealth may show, either that the subject of the larceny was received with a knowledge that it was stolen, or that it was obtained by a false token or false pretense, or that it was embezzled. Upon another point in *Anable v. Commonwealth*, 24 Gratt. 563, Judge Moncure dissented, but upon this point the court was unanimous, and, in his dissenting opinion, he declares that, with respect to false pretenses, receiving stolen property, knowing it to be stolen, and embezzlement, the statutes using identically the same language—it was manifest that it was used in the same sense, and must receive the same construction in all. We are of opinion, therefore, that upon the indictment for larceny, proof of embezzlement is sufficient to sustain the charge.

But it is contended that the proof of embezzlement is insufficient. It appears that the defendant lent Edmond Bolden six dollars for thirty days, and that, as security for the loan, he received in pawn Bolden's watch. The testimony of the defendant contradicts that of the commonwealth in certain particulars, but the great weight of evidence sustains the contention of the commonwealth, and, from that, it appears that Bolden pawned his watch with the defendant, who at the time gave a receipt which correctly stated the transaction; that he appropriated ^{§12} the watch to his own use, and by falsely and fraudulently substituting another and different paper for the one originally executed, he attempted to convert a transaction which was originally a loan into a sale, and thereby vest the property of the watch in himself. We cannot conceive of evidence more conclusive of his guilt, if the witnesses who testify are worthy of belief. Their credibility was submitted to a jury, and the jury having found a verdict in accordance with their testimony, it is beyond the power of this court to disturb it.

We are of opinion that the judgment is without error, and that it must be affirmed.

Affirmed.

IDEM SONANS.—Names are to be considered identical which sound alike: *State v. Patterson*, 2 Ired. 346; 38 Am. Dec. 699; *Barnes v. People*, 18 Ill. 52; 65 Am. Dec. 699, and note; *Myer v. Fegaly*, 89 Pa. St. 429; 80 Am. Dec. 534, and note.

LARCENY BY BAILEE.—One to whom personal property is delivered for a special purpose, but who intended when he procured such delivery to appropriate the property to his own use is guilty of larceny: *Soltan v. Gerdau*, 119 N. Y. 380; 16 Am. St. Rep. 843, and note; *Commonwealth v. Williamson*, 96 Ky. 1; 49 Am. St. Rep. 285, and note; *Smith v. Commonwealth*, 96 Ky. 85; 49 Am. St. Rep. 287. See, also, the extended note to *State v. Holmes*, 57 Am. Dec. 280, 281.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

KRUTZ v. ROBBINS.

[12 WASHINGTON, 7.]

EQUITY WILL NOT ENFORCE A PENALTY OR FORFEITURE.

PENALTY, WHAT IS.—Where the payment of a smaller sum is secured by an agreement to pay a larger, the latter will be held to be a penalty, and not liquidated damages.

AGREEMENT TO PAY INCREASED INTEREST IN THE EVENT OF DEFAULT.—A stipulation in a mortgage that, if default is made in the payment of interest or principal at the times designated, the mortgagors will pay interest on the principal at the rate of twelve per cent per annum from the date of the note until payment is made, the rate of interest in the absence of such default being only seven per cent per annum, is a stipulation for a penalty, and, therefore, not enforceable.

George Fowler and Crowley, Sullivan & Grosscup, for the appellant.

Greene & Turner, for the respondents.

* **ANDERS, J.** On March 1, 1889, the defendants Robbins borrowed from the plaintiff, Thomas S. Kurtz, the sum of two thousand five hundred dollars, for which they gave him their promissory note, payable five years after that date at the Chemical National Bank in the city of New York, with interest at the rate of seven per cent per annum, payable semi-annually. Coupons for the several semi-annual installments of interest were attached to the note, in each of which it was provided that the sum therein named, eighty-seven dollars and fifty cents, should draw interest at the rate of twelve per cent per annum after maturity. The note further provided that it should bear interest after maturity at twelve per cent per annum, and that, on failing to

pay the interest when due, the principal should become due and payable, and might be at once collected.

To secure the payment of this note, the makers, on ⁸ said day, executed to the plaintiff a mortgage on certain real estate in A. A. Denny's addition to the city of Seattle, which mortgage contained, among others, the following covenants and agreements:

"And the said first parties do hereby covenant and agree that at the delivery hereof, they are the lawful owners of the premises above granted, and seised of a good and indefeasible estate of inheritance therein, free from all encumbrances, and that they will warrant and defend the same against the lawful claims of all persons whomsoever. . . . Now, if said first parties shall pay, or cause to be paid, the said sum of money, with interest thereon according to terms of said note, then these presents shall be void; but if said sum of money, or any interest thereon, is not paid when due and payable, or if any taxes or assessments now or hereafter levied or imposed in said county or territory against said real estate, or upon this mortgage, or the notes secured thereby, are not paid when the same are due and payable, or if default be made in the agreement to keep said property insured as hereinafter set forth, then, in either of these cases, the said principal note, with the interest thereon, shall, and by this indenture does, immediately become due and payable, at the option of the second party, or assigns, to be, at any time thereafter, exercised without notice to the first parties. But the legal holder of this mortgage may, at his option, pay said taxes, assessments, or charges for insurance, so due and payable, as the mortgagors or assigns shall neglect or refuse to pay as herein set forth, and charge them against said first parties; and the amount so charged, together with interest at the rate of twelve per cent per annum, payable semi-annually, shall be an additional lien upon the said mortgaged property; and the said mortgagees or assigns may immediately cause this mortgage to be foreclosed, and shall be entitled to the immediate possession of the premises and the rents, issues, and profits thereof. Said first parties agree to keep the buildings erected, or to be erected, on said land, insured to the amount of ⁹ three thousand dollars, to the satisfaction of, and for the benefit of, the second party or assigns, from this time until said note and all liens by virtue hereof are fully paid.

"It is hereby agreed that, in case of default of payment of

any sums herein covenanted to be paid, or in default of performance of any covenant herein contained, the said first parties agree to pay to said second party or assigns interest at the rate of twelve per cent per annum, computed semi-annually on said principal note, from the date thereof to the time when the money shall be actually paid, and any payments made on account of interest shall be credited in said computation, so that the actual amount of interest received shall be and not exceed twelve per cent, computed semi-annually as aforesaid."

The first two coupons, due September 1, 1889, and March 1, 1890, respectively, were paid in full at maturity, and thereafter, at irregular intervals, various sums, but in each instance less than the amount due, were paid on account of interest, the last payment having been made on June 28, 1892. The plaintiff paid insurance premiums on two occasions, a part of which was repaid by the mortgagors; and he also paid the taxes on the mortgaged property for the years 1890 and 1891, after the same had become delinquent. The note was not paid at maturity, and, in May, 1894, this action was instituted to foreclose the mortgage.

The plaintiff in the action sought to recover interest on the note from its date at the rate of twelve per cent per annum, compounded semi-annually, in accordance with the stipulation in the mortgage above set forth. The court, however, awarded him but seven per cent interest on the note, computed semi-annually from date to maturity, and thereafter at the rate of twelve per cent per annum. Interest was also allowed on each coupon at the rate of twelve per cent per annum from maturity, as therein specified. The amount recovered ¹⁰ is eight hundred and sixty-six dollars and thirty-three cents less than plaintiff conceives himself entitled to, and hence this appeal.

The trial court, it will be seen, based its decision as to the rate of interest on the stipulation in the note itself in regard thereto, but appellant contends that the ruling was erroneous, for the reason that it gave no effect whatever to the stipulation in the mortgage providing for interest on the principal note, at the rate of twelve per cent per annum from its date in case of default. He claims that that provision was part of the contract between the parties, and that, inasmuch as it is not contrary to law or public policy, and is not immoral, it should be enforced as made. On the other hand, the respondents insist that the provision in the mortgage for a higher rate of interest in default of payment

of the principal or interest specified in the note, is in the nature of a penalty and unenforceable in equity. If this provision is a penalty, there can be no doubt that it is unenforceable, for it is a universal rule in equity never to enforce either a penalty or a forfeiture: 2 Story's Equity Jurisprudence, sec. 1319.

But what is a penalty, and what is liquidated damages, in a given case, it is not always easy to determine. As the question is one of intention, no single rule can be laid down which will furnish a certain and satisfactory criterion for all cases. In most cases many circumstances must be considered in order to ascertain the real intention of the parties. The courts, however, have deduced from the authorities certain general rules, "each having more or less weight, according to the peculiar circumstances of each case." Among these rules is one which is almost universally recognized and acted on, and which is, that where the payment of a smaller sum is secured by an agreement to pay a larger sum, the larger sum will be held a penalty, and ¹¹ not liquidated damages: *Keeble v. Keeble*, 85 Ala. 552, and cases cited; 1 Pomeroy's Equity Jurisprudence, sec. 441; *Adams' Equity*, 108; 2 Parsons on Notes and Bills, 413, 414; *Seton v. Slade*, 7 Ves. Jr. 265; 3 Blackstone's Commentaries, 432; *Holles v. Wyse*, 2 Vern. 284; *Strode v. Parker*, 2 Vern. 306; *Orr v. Churchill*, 1 H. Black. 227; *Bonafous v. Rybot*, 3 Burr. 1370; *Parker v. Butcher*, L. R. 3 Eq. 762; *Tiernan v. Hinman*, 16 Ill. 400; *Watts v. Watts*, 11 Mo. 547; *Mason v. Callender*, 2 Minn. 350; 72 Am. Dec. 102; *Richardson v. Campbell*, 34 Neb. 181; 33 Am. St. Rep. 633; *Waller v. Long*, 6 Munf. 71.

In *Alexander v. Troutman*, 1 Ga. 469, this is said to be the settled doctrine. If this case, therefore, falls within the rule stated, the provision in the mortgage for an increased rate of interest, in case of default in the payment of principal or specified interest, is in the nature of a penalty, and the trial court was right in refusing to enforce it. While, in construing contracts, due weight will be given to the language used, still courts of equity will not be absolutely controlled by the words employed, when the enforcement of such contract will cause an unconscionable hardship, or otherwise work an injustice: *Keeble v. Keeble*, 85 Ala. 552.

A penalty has been defined to be an agreement to pay a greater sum to secure the payment of a less sum (*Henry v. Thompson, Minor*, 209), and it seems to us that this case clearly falls within that definition and the rule above stated. The additional rate

of interest is essentially a penalty, although not designated as such. It could not have been intended as compensation for the use of the principal before maturity, for the reason that seven per cent interest was agreed on as the rate of compensation. It could not have been intended as compensation for ¹² failure to pay the interest when due, because it is neither proportioned to the amount of interest nor the length of time the debtor is in default. The provision for five per cent extra interest must therefore be considered as a provision to secure the prompt payment of seven per cent interest on the principal debt, and also taxes, insurance, and principal when due.

The learned counsel for the appellant cite a large number of cases in support of the proposition, that whether a debtor shall pay any interest, or a higher or lower rate of interest, may be made by agreement of parties to depend upon his prompt payment of the principal at maturity. But most of them are cases where the contract provided for no interest, if the principal should be paid at maturity, but contained a provision for interest, if payment was not so made. Whether such a contract would be enforced was the question to be determined in the following cases cited by appellant: *Rumsey v. Matthews*, 1 Bibb, 242; *Gully v. Remy*, 1 Blackf. 69; *Horner v. Hunt*, 1 Blackf. 214; *Hackenberry v. Shaw*, 11 Ind. 392; *Satterwhite v. McKie*, Harp. 397; *Wakefield v. Beckley*, 3 McCord, 480; *McNairy v. Bell*, 1 Yerg. 502; 24 Am. Dec. 454; *Parvin v. Hoopes*, 1 Morris, 294; *Horn v. Nash*, 1 Iowa, 204; 63 Am. Dec. 437; *Fisher v. Anderson*, 25 Iowa, 28; 95 Am. Dec. 761; *Alexander v. Troutman*, 1 Ga. 469; *Rogers v. Sample*, 33 Miss. 310; 69 Am. Dec. 349; *Reeves v. Stipp*, 91 Ill. 609; *Parker v. Plymell*, 23 Kan. 402; *Main v. Casserly*, 67 Cal. 128.

For various reasons, some of which are not very satisfactory, these several courts held such a contract valid and enforceable. In some of them, the decisions were based on the notion that the contract in controversy was equivalent to an agreement for a ¹³ specified rate of interest, with a provision that the interest would be remitted if the principal was paid at maturity. See *Reeves v. Stipp*, 91 Ill. 609; *Rumsey v. Matthews*, 1 Bibb, 242; *Satterwhite v. McKie*, Harp. 397; and in all of them the conclusion reached was deemed to be in accordance with the real intention of the parties, as gathered from the whole agreement. So, in this case, the court ascertained and gave effect to the primary and principal agreement, and refused to enforce the superadded condition, be-

cause such condition was, in effect, a penalty. We think, however, that the above cases are distinguishable from the case at bar in many particulars.

Appellant also cites *Daggett v. Pratt*, 15 Mass. 177, and *Wilkinson v. Daniels*, 1 G. Greene, 180, both of which hold that, where a rate of interest before maturity is specified, and the contract provides for a higher rate if payment be not made at maturity, such higher rate is recoverable as upon the contract. The first of these cases is a law case, and the question of penalty does not seem to have been presented or considered; and in the second the decision appears to have proceeded on the theory that the contract to pay the higher rate of interest depended on a condition permitted by law. That argument would seem to be fallacious, for the reason that it assumes that any contract not permitted by law is enforceable, whereas the rule is, that equity will not enforce a penalty, even if it be not prohibited by law. But it would appear that that case, as an authority upon the point decided, is weakened, if not destroyed, by the subsequent case of *Conrad v. Gibbon*, 29 Iowa, 120. But whether that be true or not, it seems to us that that case is contrary to the rule generally recognized by courts of equity. And, besides, in this case there are ¹⁴ several contingencies or conditions which were not in that, and which appear to be penal in their nature. For instance, in the case at bar, the higher rate of interest is provided, not only for default in payment of the principal, but for default in the payment of interest, or insurance, or taxes. Moreover, the consequence is the same, whether the least important or the most important of these stipulations is violated, viz., the payment of a higher rate of interest on the principal from date. And this is a further reason why these provisions for an increased rate of interest should in this case be considered a penalty: 1 *Pomeroy's Equity Jurisprudence*, 441-444; 2 *Greenleaf on Evidence*, sec. 258; *Berry v. Wisdom*, 3 Ohio St. 241; *First Orthodox Church v. Walrath*, 27 Mich. 232; *Daily v. Litchfield*, 10 Mich. 29; *Jackson v. Baker*, 2 Edw. Ch. 471; *Lampman v. Cochran*, 16 N. Y. 275; *Alexander v. Troutman*, 1 Ga. 469.

It may be said to be a general rule that the only cases in which the courts will give effect to a contract to pay a stipulated sum as damages are those where the damages provided against are uncertain and not ascertainable by any satisfactory and certain rule of law: *Mason v. Callender*, 2 Minn. 350; 72 Am. Dec. 102; 2 *Greenleaf on Evidence*, sec. 259. The case of *Galsworthy*

v. Strutt, 1 Ex. 659, cited by appellant, is one of the numerous cases which might be cited illustrative of this principle. For the nonpayment of money the law awards interest as damages, and hence there is no difficulty in ascertaining the damages in this case, and it therefore does not fall within the rule just cited.

We think the judgment of the trial court gave appellant all he was entitled to, and it must therefore be affirmed, and it is so ordered.

Hoyt, C. J., and Dunbar, Scott, and Gordon, JJ., concur.

EQUITY NEVER ENFORCES EITHER A PENALTY OR A FORFEITURE: Woolverton v. Taylor, 132 Ill. 197; 22 Am. St. Rep. 521, and note. Forfeitures are not favored in equity, and will not be enforced if couched in ambiguous language: Cleary v. Folger, 84 Cal. 316; 18 Am. St. Rep. 187; Hall v. Delaplaine, 5 Wis. 206; 68 Am. Dec. 57. Forfeitures are not favored in equity: Whitton v. Whitton, 38 N. H. 127; 75 Am. Dec. 163.

PENALTIES OR LIQUIDATED DAMAGES.—If the parties to a contract have provided for damages for a breach of one or more of the stipulations therein, when the loss resulting from such breaches must clearly have differed in amount, or have named an excessive sum, in a case where the real damages are certain, or readily reducible to certainty, by proof before a jury, or a sum which it would be unconscionable to award, under any of these conditions the sum designated is a penalty: Monmouth Park Assn. v. Wallis Ironworks, 55 N. J. L. 132; 39 Am. St. Rep. 626, and note. See, especially, the extended note to Graham v. Bickham, 1 Am. Dec. 331-340.

SNIVELY v. MATHESON.

[12 WASHINGTON, 83.]

PARTNERSHIP, TRADING, WHAT IS NOT.—A partnership for the purpose of carrying on the business of general contractors and builders is not a general or trading partnership, nor does the fact that the partnership furnished a limited amount of goods to the men working for it, and deducted the price thereof from their wages, convert it into a trading partnership.

PARTNERSHIP, AUTHORITY OF PARTNER TO BIND FIRM. The presumption in a nontrading partnership is, that neither partner has authority to bind the firm by a promissory note. This presumption may be rebutted only by proving that such authority was given by the partnership articles, or had been specifically conferred, or that it had been the custom of the partnership to recognize the right of a partner to make such notes to such an extent as would give innocent dealers a right to rely upon the custom.

PARTNERSHIP—PLEADING—DENIAL OF THE INTEREST OF ONE PARTNER.—In an action against a partnership to foreclose a mortgage purporting to be executed upon its property, and where the articles of copartnership declare that each partner shall have such interest in the partnership property and funds, evidence is not admissible to prove that one of the partners had no interest in the property mortgaged.

Edward Pruan and Fred Miller, for the appellant.

Wager & Graves, for the respondent.

ss DUNBAR, J. This action was brought by the appellant against David Matheson and Charles Dickson, copartners under the firm name and style of Matheson & Dickson, to foreclose a chattel mortgage on a certain grading outfit, comprised of mules, scrapers, etc., and given to secure a certain promissory note signed by Matheson and Dickson in the partnership name. G. E. Dickson, who had obtained judgment against the firm of Matheson & Dickson for something over six hundred dollars, and who had attached the property embraced in the **ss** chattel mortgage given to appellant, was also made a party to the action.

The complaint alleges that the defendants Matheson and Dickson executed and delivered to plaintiff the promissory note above mentioned, and that they secured the same by the execution and delivery of the chattel mortgage above referred to, and contains the other necessary allegations in regard to the record of the mortgage, etc.

The defendant Charles Dickson, one of the firm of Matheson & Dickson, answered separately, and denied the execution and delivery of the note and mortgage by the firm of Matheson & Dickson; denied the reasonableness of the attorney's fee, which was alleged in the complaint to be two hundred and fifty dollars; denied that the appellant was the owner and holder of the note sued upon; and affirmatively alleged that the copartnership between him and respondent Matheson was one for the purpose of carrying on a contracting business for work to be performed by men and teams, and for sharing the profits and losses of such work; alleged that, by the articles of copartnership entered into between them, it was agreed that neither of the parties of said copartnership should have the power to incur any liability without the express consent of the other member thereof; denied any indebtedness on the part of the firm of Matheson & Dickson to the appellant; and alleged that the note and mortgage executed by Matheson to appellant were made without any consideration, and were executed and delivered by Matheson to appellant with the intent and design on the part of said Matheson and appellant to cheat and defraud said defendant, and to cheat and defraud the creditors of said copartnership, and for the purpose of carrying out a conspiracy between said Matheson and

appellant to ⁹⁰ cheat and defraud the said creditors by transferring and disposing of the property of said copartnership to appellant; alleged notice on the part of appellant that said Matheson had no right to incur any liability for the firm of Matheson & Dickson, or to mortgage any of its property; and many other allegations not necessary to mention here.

The separate answer of respondent G. E. Dickson simply set up his rights under his judgment and levy, and affirmatively alleged that the property sought to be foreclosed by appellant was all the property of the firm of Matheson & Dickson, and that the said mortgage to appellant was made by said Matheson with intent to hinder, delay, and defraud the creditors of said partnership, etc.

The reply of the appellant denied the allegations contained in the affirmative defenses of all of the respondents.

Upon the trial of the cause, the court found that appellant's mortgage was null and void, and gave him no lien on said partnership property, and denied the foreclosure thereof; but decreed that the lien of the respondent G. E. Dickson, on the property described in the complaint, by virtue of the attachment set out in his answer, was a valid and subsisting lien on said partnership property.

The pertinent point to be decided in this case is the extent of the power of one partner to bind his copartner to a contract entered into by him alone. It is contended by the appellant in this case that this partnership was a general or trading partnership, as distinguished from a nontrading partnership, and some few cases are cited which would tend to sustain this contention. But the overwhelming weight of authority places this partnership in the list of nontrading partnerships. ⁹¹ The essential conditions of the articles of agreement are as follows:

"That the said David Matheson and Charles Dickson do hereby associate and enter into copartnership one with the other for the purpose of carrying on the business of general contractors and builders under the firm name and style of Matheson & Dickson. . . . And do hereby agree one with the other as follows, to wit:

"First. That each party to this agreement shall give his whole time and attention to the business, the said David Matheson to have charge and superintend the outside work of said firm, and the said Charles Dickson to keep all books and to

attend to all other clerical work and have the purchasing of all materials needed.

"Second. No contract shall be entered into by either party hereto without the consent of the other, and no stock or materials shall be purchased, or any liability incurred, by either party without the consent of the other.

"Third. Neither party to this agreement shall indorse, or become bondsman or surety on, any instrument of writing not connected with the business of the firm during the existence of this partnership.

"Fourth. Each party shall have an equal interest in said copartnership and the copartnership property and effects, and all profits arising from such copartnership, after deducting all losses and expenses, shall be divided equally between said David Matheson and Charles Dickson, share and share alike."

Thus it will be seen that this was in no sense a trading or general partnership, but that its purpose was special and limited to the business of contracting and building, a business that in no sense buys or sells merchandise of any character. There is some attempt in the testimony to show that a mercantile business was carried on in connection with the contracting business, but it amounted simply to this, that a very limited amount of goods were furnished by the ⁹² contractors to the men who were working for them, and the price of these goods deducted from their wages. The trade was limited to their own workmen, and a portion of their wages was paid in these goods instead of with money. They did not represent themselves to be traders with the outside world, or traders in any sense whatever. In fact, it is conceded that they had not been doing business of any kind for a long time prior to the execution of the note and mortgage; that the livestock was out on pasture, and the other stock was stored, and that there was no prospect of any resumption of active business of this firm. So that the question of the power of Matheson to execute this note and chattel mortgage, if discussable at all, must be discussed from the standpoint of a partner in a nontrading partnership.

The general rule is, that, so far as a general partnership, or, in other words, a trading or mercantile partnership, is concerned, each partner constitutes the other his agent for the purpose of entering into all contracts for him within the scope of the partnership business. This power rests in the usage of merchants,

and grew out of the necessities of commercial business. Therefore, the doctrine of implied liability received the sanction of law, and has for a long time been, and now is, enforced by the courts. But this implied liability does not extend to partners in nontrading partnerships. In such cases the rule announced above is reversed, and the presumption is, that one partner has no power to bind the other partners. Hence, before recovery can be obtained upon a contract entered into by one partner in a nontrading partnership against the other partners, it must be affirmatively shown by the party attempting to bind the noncontracting partners, either that the authority to bind was conferred ⁹³ by the articles of incorporation, or that authority had been specially conferred, or that it had been the custom of such partnership to recognize this right to such an extent as would give innocent dealers a right to rely upon the custom.

This doctrine was substantially announced so early as 1829, in *Dickinson v. Valpy*, 10 Barn. & C. 128. In this case the partnership was a mining company, formed for the purpose of working mines. Justice Littledale, in speaking of the subject in hand, said:

“In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bill, because the drawing and accepting of bills is necessary for the purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purposes of carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to show that, in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others by drawing and accepting bills of exchange. . . . One of several persons jointly interested in a farm has no power to bind the others, by drawing or accepting bills, because it is not necessary, for the purposes of carrying on the farming business, that bills should be drawn or accepted. The object of persons concerned in such an undertaking is to sell the produce of the farm; and though, with a view to such sale, it may be necessary to buy many things in order to raise and put the produce in a salable state, yet it is not necessary for that purpose that bills of exchange should be drawn. Even if that were necessary for the purpose of carrying on a mining concern, though not for the purpose of managing a farm, it was incumbent on the plaintiff, in this case, to have

shown, either from the very nature of this company, that it was necessary, or, from the practice in other similar companies, that it was usual."

⁹⁴ Certainly, a mining business is as general a business as that of contractors and builders. All the judges concurred, by separate opinions, in this decision, and the general doctrine is laid down at length as we have announced it above.

Bates on Law of Partnership, section 343, announces the general rule to be, that in nontrading partnerships no authority to sign mercantile paper by one partner is implied, and that it makes no difference that it was for the benefit of the firm. This rule is sustained by the great weight of authority, although the author says that, nevertheless, there are a number of cases in which mercantile paper has been held binding on such firms. "The test seems to be," says the author, "whether the paper is essential to carry into effect an ordinary purpose for which the partnership was formed. By such test it would seem that a note to pay a debt or to borrow money, even though it be borrowed to pay a debt or make a purchase, may not be binding without proof of assent of the other partners, or a usage of such business." The same rule is substantially announced in Story on Partnerships, section 102.

In *Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757, which is a leading case, where the court collated the authorities, it was held that one partner in a nontrading partnership cannot bind his copartner by a bill or note, drawn, accepted, or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his copartner, or unless the giving of such instrument is necessary to the carrying on of the firm business, or is usual in similar partnerships, and that the burden is upon the holder of the note to prove such authority, necessity, or usage.

⁹⁵ In this case, there was no proof of the necessity, or of the authority, or of the usage. In fact, the giving of the mortgage in question would have more of a tendency to destroy the business than to assist in carrying on the business of the firm, for all the property that was owned by this firm was included in this mortgage.

Deardorf v. Thacher, 78 Mo. 128, 47 Am. Rep. 95, decided that "the members of a firm engaged in the insurance, real estate, and collecting business, have no implied power to bind each other by commercial paper in the name of the firm. Such power

can only arise from consent, ratification, custom, or necessity." The court there quotes the case of *Hedley v. Bainbridge*, 3 Ad. & E., N. S. 315, where Lord Denman, chief justice, said: "No doubt, a debt was due from the firm; but it does not follow that one partner had authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange, for it is in the usual course of mercantile transactions so to do; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships."

In *Pooley v. Whitmore*, 10 Heisk. 629, 27 Am. Rep. 733, where a member of a public partnership executed his note for his individual debt, but indorsed it in the firm name to a bona fide holder, it was held that the firm was not prima facie liable upon it; and the distinction between the implied powers of trading and nontrading partnerships was discussed. To the same effect is *Friend v. Duryee*, 17 Fla. 111; 35 Am. Rep. 89. *Harris v. Mayor etc. of Baltimore*, 73 Md. 22, 25 Am. St. Rep. 565, is a case that seems to us to be exactly in point. This was a partnership ⁹⁶ formed for taking and executing contracts for paving and curbing streets, etc., and the court decided that it was not a commercial partnership, and that the individual members thereof had no implied authority to borrow money and make notes therefor to bind the firm, in the absence of proof to show actual necessity, or usage, for the exercise of such power in conducting the business. This case reviews the authorities, and is well argued, and the conclusion was reached upon a petition for rehearing, in the former opinion the court having come to the conclusion that the implied authority existed.

Our attention was called in oral argument, by counsel for the appellant, to the dissenting opinion of Judge Bryan, in this case, as the better reasoning. Judge Bryan had written the former opinion of the court, which was reversed, and still maintained his original views. But, whatever may be the strength of his reasoning, as compared with that of the majority of the court, the majority opinion expresses the decision of the court, and is so in conformity with the great weight of authority on this subject that we feel constrained to follow it, although, we do not wish to be understood as impliedly asserting that the argument of the dissenting judge was more cogent than that of the majority.

Another well-reasoned case in support of respondents' contention is *Judge v. Braswell*, 13 Bush, 67; 26 Am. Rep. 185. This was a partnership formed of several for the purpose of carrying on the business of mining, on lands leased for that purpose, with power to purchase the title to the mining lands for the purposes of the partnership. The articles prohibited any member of the partnership from contracting any debt on account of the partnership without the consent of ⁹⁷ all the members. One of the members, without the knowledge or consent of his copartners, purchased mining lands from third parties ignorant of that restriction, and in payment gave drafts in the firm name upon one of the other members, who refused to honor them. In an action by the payee against the firm, held: 1. That the partnership was a noncommercial partnership; 2. That the power of one partner to bind the copartners rests upon usage alone, and does not apply to noncommercial partnerships without proof of usage or express authority; 3. That there is no implied authority in such partnership to purchase lands for the firm. In that case the court said: "It is contended, however, that the purchase of lands being within the scope of the partnership, each member had implied authority to make purchases for the firm, and that whatever may have been the rights and duties of the partners *inter esse*, and the express limitation upon their power contained in the written agreement between them, third persons dealing with a single partner, without notice of the private agreement between them, cannot be affected by it. This is undoubtedly true as to commercial partnerships; but it is a rule of the law merchant which has been adopted into the common law, and rests for its support upon the custom of merchants alone, and has no application to noncommercial partnerships."

This is a broader case in favor of the doctrine that it was a general mercantile partnership than the one at bar, for there the partnership was organized for the purpose of carrying on a mining business on leased land, and for the purpose of buying and obtaining title to mining lands; and the power which was exercised by this partner, viz., that of buying mining lands, fell especially within the scope of the partnership ⁹⁸ business, and yet the court held that it was a nontrading partnership, and that no implied authority existed.

We think it is not worth while to discuss the authorities further, for, as we have above stated, while there are some few cases holding to the contrary doctrine, yet the rule, as we have stated

It, is sustained by the overwhelming decisions, both ancient and modern.

Neither is there anything in the testimony to take this case out of the rule, equitably or legally. There was some attempt to show a custom of this kind in one or two instances, but we are satisfied from the testimony that Dickson gave these orders under a misapprehension of the true state of affairs, and by reason of false representations made to him by Matheson. On all these questions in controversy between Dickson and Matheson, it must be noted that Matheson's testimony in many respects is flatly contradicted by the testimony not only of Dickson, but by that of Johnson and Warner, who were disinterested parties.

We do not think that the court erred in not allowing the appellant to show that Dickson had no interest in the property mortgaged, under the condition of the pleadings in this case, and in the face of the articles of agreement which were made a part of the pleadings, and which were not denied.

Finding no substantial error, the judgment will in all things be affirmed.

Hoyt, C. J., and Anders, Scott and Gordon, JJ., concur.

PARTNERSHIP — NONTRADING — POWER OF ONE PARTNER TO BIND FIRM.—Nontrading partnerships are usually defined to be such as are limited to a single enterprise, and are not engaged in trade, and it is a universal rule of law that the members of a nontrading or noncommercial partnership have no implied authority to borrow money and bind the firm therefor by notes given in its name, or to pledge the assets of the partnership as security for money borrowed, in the absence of proof to show the actual necessity or usage for the exercise of such power by the individual members of the firm in conducting its business: Extended note to *Baxter v. Rollins*, 48 Am. St. Rep. 441.

LEWIS v. BARTLETT.

[12 WASHINGTON, 212.]

EXECUTION SALES—CHANGE IN THE OFFICE OF SHERIFF.—If the sheriff who levies an execution on real property, and advertises it for sale, goes out of office before the day appointed for the same, it may be made by his successor in office.

Rupert & Fitzgerald, for the appellants.

Morris B. Sachs, for the respondent.

Hoyt, C. J. Respondent obtained a judgment against appellants, and caused an execution to be issued thereon and placed

in the hands of Richard De Lanty, who at the time was sheriff of the county. On the twentieth day of December, 1894, this execution was by said sheriff levied upon certain real estate, the property of the appellants. Thereafter said Richard De Lanty, sheriff as aforesaid, began the publication of a notice which fixed the time of sale on the twenty-second day of January, 1895, before which date the term for which said De Lanty held the office of sheriff expired, and M. F. Hamilton, as his successor in said office, entered upon the discharge of its duties, and thereafter, ²¹³ on the said twenty-second day of January, sold the property levied upon by said De Lanty under the execution without the issuance to him of a writ of venditioni exponas; and on the same day made return as to said sale, which was afterward, over the objections of the appellants, confirmed by the court; and from this order of confirmation this appeal has been prosecuted.

The only reason suggested why the order of confirmation should not have been made is, that the sheriff who succeeded the one to whom the execution had been delivered could not rightfully make the sale thereunder. The question as to whether or not a sheriff can complete the service of an execution which has been begun by his predecessor has been often before the courts, and the decisions thereon cannot be harmonized. In England, much formality was required in the transfer of the office by a sheriff to his successor, and, under such practice, it was held by most of the courts that until he had been relieved of the duties of the office by a transfer thus formally made, he was liable for the proper transaction of the business relating thereto, and, on that account, it was held that process in his hands should be executed by him rather than by his successor, even although his term of office had expired. In this country, the practice of thus formally transferring the office of sheriff has never prevailed. Upon the expiration of his term and the qualification of his successor, such successor becomes entitled to all the emoluments of the office, and upon him is cast the burden of the discharge of its duties, excepting so far as, from the necessities of the case, they should be performed by his predecessor. Process, under our practice, is rightfully directed to the sheriff of the proper county, and it is not necessary that the person holding such office should be named therein. It would ²¹⁴ seem to follow, as a logical conclusion, that whoever was for the time being in possession of the office should execute process directed thereto, and that if, after process had been so directed, the person in possession of the office

should change, the command thereof would apply to the one who had succeeded to the office, rather than to one who had been removed therefrom. The sheriff's duties, extraordinary excepted, should be held to have ended with the expiration of his term.

Most, if not all, of the courts have decided that the levy of an execution upon personal property gave the officer making the levy a special property therein, and for that reason it has been held by such courts that it was his duty to complete the service of an execution so levied, if necessary, after the expiration of his term. If the officer who levies an execution on personal property acquires a special title thereto, such fact may furnish reason for the holding that he should complete the service after the expiration of his term, but it does not follow that he should be required to complete the service of an execution so levied upon real estate. By the levy the title to the real estate is not transferred, and there is no good reason why, after such levy, the successor of the one who has made it cannot as well complete the service, by the sale of the property and the return of the execution, as to have the same acts done by his predecessor in office; and since the one who is in the actual possession of the office can best be held responsible for the proper discharge of its duties, the interest of all concerned would be best subserved by holding that he should complete the service of the execution which has been levied upon real estate.

It may be conceded that, taking the cases old and new, the greater number support the doctrine that the ²¹⁵ sheriff who made the levy should complete the service of the execution, but a large number of courts of the highest standing have come to the contrary conclusion, and have held in accordance with the above suggestions; and as such holding will, in our opinion, lead to less confusion than the other, we are satisfied to follow it.

Freeman on Executions, section 62, lays down the rule that, where the levy is upon real estate, the successor in office may complete the service of the execution, and that his authority to do so is not by virtue of any writ of venditioni exponas which may be directed to him, but is derived from the execution directed to his predecessor in office. At the close of said section this learned author makes use of the following language: "The better opinion is, that if a levy be made upon real estate, the officer levying the writ may, after the expiration of his term, complete the execution of the writ by a sale and conveyance; but that his powers in this respect are concurrent with those of his successor in office,

and, therefore, that the venditioni exponas may properly be issued to and executed by either."

The latter clause of the above quotation would seem to indicate that it was necessary that this writ should be directed to the successor in office to authorize him to make the sale, but, when what is therein stated is taken in connection with the rest of the section, it will be seen that such writ only issues for the purpose of compelling the sheriff to do that which he would otherwise have the power to do.

In the case of *Leshey v. Gardner*, 3 Watts & S. 314, 38 Am. Dec. 764, this question was passed upon by the supreme court of Pennsylvania, and, after a full consideration of the practice in England and in this country, that learned court came to the conclusion ²¹⁶ that the successor in office could properly complete the service of the execution.

To the same effect are *Bellingall v. Duncan*, 3 Gilm. 477; *Bank of Tennessee v. Beatty*, 3 Sneed, 305; 65 Am. Dec. 58; *Clark v. Sawyer*, 48 Cal. 133; *Holmes v. McIndoe*, 20 Wis. 657; *Kane v. McCown*, 55 Mo. 181.

These cases furnish authority upon which we feel authorized to decide the question. Many of the courts which have held to the contrary were of the opinion that it would have been better if the practice had been for the new sheriff to complete the execution of the writ, and only founded their decisions to the contrary upon a practice which had grown up under the rule in England, in the states in which the decisions were made, or in those from which their practice was largely derived. Many cases of this kind could be cited, but we call attention to one as furnishing sufficient illustration of the opinion of such courts: See *Fowble v. Rayberg*, 4 Ohio, 45.

We feel the more ready to adopt this rule, for the reason that, to our mind, the practice in England should have little or no weight in determining the practice here upon sales of real estate, for the reason that in England only personal property could be sold on execution.

In our opinion, the superior court adopted the rule which best accords with reason and is sufficiently supported by authority.

Judgment affirmed.

Scott, Anders, and Gordon, JJ., concur.

EXECUTION SALES—CHANGE IN OFFICE OF SHERIFF.—
When a writ of execution, issued to a coroner because of a vacancy in the office of sheriff, is turned over unexecuted to the new sheriff after he

has been appointed and has qualified, he may make a valid levy and sale thereunder: *Carr v. Youse*, 39 Mo. 346; 90 Am. Dec. 470. A new sheriff must execute an unexecuted writ of venditioni exponas received from his predecessor and make a conveyance to the purchaser: *Leskey v. Gardner*, 3 Watts & S. 341; 38 Am. Dec. 764, and note. A sheriff is bound to execute a writ unexecuted by his predecessor: *State v. Roberts*, 12 N. J. L. 114; 21 Am. Dec. 62; but see *Purl v. Duvall*, 5 Har. & J. 69; 9 Am. Dec. 490. See, also, the extended note to *Tukey v. Smith*, 36 Am. Dec. 705.

BRYAN v. DUFF.

[12 WASHINGTON, 233.]

PAROL EVIDENCE IS NO MORE ADMISSIBLE to contradict or vary a contract implied from a written instrument than it is to contradict or vary the express terms of such instrument.

THE DRAWER OF A DRAFT OR OTHER BILL OF EXCHANGE WILL NOT BE PERMITTED TO PROVE BY PAROL that, at the time it was drawn, the payee agreed that he would not hold the drawer answerable for any default in its payment.

Reynold & Stewart, for the appellant.

N. H. Bloomfield and J. N. Percy, for the respondent.

²³⁴ HOYT, C. J. Respondent was indebted to one H. O. Taylor, and the Ainslie Lumber Company was indebted to him. In payment of his indebtedness to Taylor, he drew an order, payable ninety days after date, on the said lumber company, which was accepted by it. Before it became due, the lumber company became insolvent, and the draft was not paid. This action was brought by the plaintiff, as assignee of the said Taylor, the payee of the draft, to recover of the defendant, as the drawer thereof.

It appears from the record that due notice of the dishonor of the draft was given to the drawer, and his liability thereon established, and it is clear that plaintiff was entitled to judgment, if it was not competent for respondent to show, by oral testimony, that, at the time the draft was drawn, it was agreed, as between the drawer and payee, that the payee would not hold the drawer responsible for any default on the part of the drawee in the payment of the draft. Parol evidence to that effect was admitted over the objection of ²³⁵ plaintiff, and the rightfulness of the action of the court in admitting it is substantially the only question presented on this appeal.

Respondent makes a further contention, that the circumstances surrounding the transaction were sufficient to show that a new contract by way of novation had been entered into, but,

in our opinion, there was no proof which would warrant any such contention, if the evidence as to the agreement of the payee not to hold the drawer responsible was stricken from the record. That the general rule is, that parol evidence cannot be admitted to change or contradict the terms of a written agreement, is so well established that it is not necessary that we should say anything in support thereof, and respondent makes no contention against such rule, but contends that the evidence was properly admitted for two reasons: 1. That it did not tend to change or contradict any written agreement; and 2. That if it did, the circumstances surrounding the transaction brought it within one of the exceptions to such general rule.

The first contention is founded upon the claim that the liability of the drawer grows out of a legal conclusion, which conclusion is not in writing, and that for that reason to vary or contradict such conclusion is not to vary or contradict a written instrument. In our opinion, the liability of the drawer of a bill of exchange or the indorser of a note has become so well established, under the rules of the law merchant, and are so well understood, that the person who assumes such liability must be held to have understood the effect thereof, and by his signature to have bound himself in the same manner as he would have done had the conditions been, at the time of such signature, fully written out and signed by him.

²³⁶ A few cases have been cited by respondent for the purpose of establishing his contention; but a careful examination thereof has led us to believe that, with a single exception, they are not strictly in point. One of them does fully sustain the rule contended for.

This case is entitled to consideration by reason of the learning and ability of the distinguished judge who made the decision, but even his distinguished ability cannot give to the case the weight which would attach to a like decision by a court of last resort. The ruling was made during the progress of a trial as a part of the instructions to the jury, and for that reason probably not so fully considered as it would have been in a court of last resort: See *Susquehanna Bridge etc. Co. v. Evans*, 4 Wash. C. C. 480.

The other claim is, that the testimony was admissible to prevent fraud upon the drawer, and numerous cases have been cited to show that it was admissible for that purpose. Many of these cases undoubtedly hold that parol evidence is admissible to show

that the contract growing out of the drawing of a bill of exchange or the indorsement of a promissory note was fraudulent, but in so doing they only announce a well-recognized doctrine, that any contract, whether in writing or in parol, can be defeated by showing that its execution was induced by fraud or that it was without consideration; and, in our opinion, none of the cases cited go farther than to sustain this well-recognized exception to the general rule as to the admissibility of parol testimony to affect a written instrument.

The rule that the contract which is implied on the part of such drawer or indorser must have the same effect as though it had been reduced to writing and placed above the signature, is not only the reasonable one, but is supported by the great weight of authority, ²³⁷ and a like weight of authority has established the rule that parol testimony cannot be introduced for the purpose of showing any agreement on the part of the payee or indorsee tending to affect such implied contract. The supreme court of Maine has several times passed upon this question, and has decided that such testimony cannot be admitted in favor of a drawer or indorser to relieve him of the liability implied by his signature, and has further decided that such contract will not support a recovery in an independent action brought thereon: See *Hancock v. Fairfield*, 30 Me. 299; *Evans v. Smith*, 34 Me. 33.

In *Barry v. Morse*, 3 N. H. 132, substantially the same question was passed upon, and the rightfulness of the exclusion of the parol testimony sustained. The supreme court of Illinois has given this question attention in a large number of cases. In a few of the earlier ones, there are some expressions tending to support the contention of respondent, but the latter cases so emphatically contradict such contention, without making any statement of an intention to overrule the earlier ones, that all of the cases construed together must be held to establish the doctrine laid down in the latter ones. That these fully sustain the contention of appellant that such testimony is inadmissible will sufficiently appear from an examination of two cases: *Beattie v. Browne*, 64 Ill. 360, and *Kirkham v. Boston*, 67 Ill. 599.

The supreme court of Indiana, in the case of *Campbell v. Robbins*, 29 Ind. 271, passed upon this question, and the language used well sustains the headnote made by the reporter, which is in the following language: "The legal effect of an assignment in blank of a promissory note cannot be varied by evidence of

a parol, contemporaneous agreement that the note should be taken without recourse on the assignor."

²³⁸ Mr. Parsons, in his work on Notes and Bills, volume 2, at page 501, states his views on this question in the following language: "If the defendant endeavors to prove an oral bargain between himself and the plaintiff, which differs in its terms from the written note, it will then be remembered that it is a firmly settled principle, that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, to add to, or subtract from, the absolute terms of the written contract."

By statements in connection therewith, he shows that in the term "written contract" is included the contract implied by law on the part of the indorser or drawer, as well as those actually written out and signed. If the testimony introduced on the part of the respondent had tended to show that the making of the bill of exchange had been induced by fraud, or that there had been no consideration therefor, it would have been admissible, and, if sufficient, would have justified the conclusion reached by the trial court. But, in our opinion, it had no such tendency. It was conceded that it was drawn for a sufficient consideration, and there was not even a suggestion that there was any fraud on the part of the payee.

The rule as to written contracts not being subject to change by contemporaneous oral agreements is of such importance that it should not be departed from, unless such departure is brought within well-settled exceptions to the rule. The right of parties to put their final conclusions into writing, and thereby avoid any question of veracity as to what such conclusions were, is of the greatest public and private convenience.

The circumstances surrounding the case at bar did not warrant a departure from the rule, and, for the ²³⁹ reason that it was departed from by the trial court, the judgment must be reversed and the cause remanded, with instructions to enter judgment in favor of plaintiff, in accordance with the prayer of his complaint.

Scott and Anders, JJ., concur.

Gordon, J., concurs in the result.

JUDGE DUNBAR, dissenting, said: "I am unable to agree with the majority opinion in this case. Of course, there is no disputing the general rule, that parol evidence cannot be introduced to alter or explain

written agreements; but it does not seem to me that the reasons which forbid the admission of parol evidence to alter or vary the terms of a written agreement apply to contracts where the obligation is implied. If a man makes an agreement, and reduces the terms of the agreement to writing, and solemnly signs it, for reasons which have often been stated, he ought to be held to a strict compliance with its terms; he knows just what he has agreed to do, and just what his obligations are, for they are of his own making. But it is altogether different when he is held to do something by a refined implication of law of which the ordinary citizen has no knowledge. In this case, the terms of the written agreement are not sought to be avoided, explained away, or disputed. The defendant gave an order to the plaintiff on the Ainslie Lumber Company. He is not disputing this fact. He gave the order for a certain amount of money. The amount is not disputed. In fact, there is nothing in the written instrument itself which is disputed. The contention, and the reasonable contention of the respondent is, that it was only that part of the agreement, viz., the agreement that the Ainslie Lumber Company should pay to the appellant so much money, that was put in writing; and that the other portion of the agreement, which is entirely disconnected from the main agreement, viz., that the appellant should have no recourse on the respondent in case of the failure of the Ainslie Lumber Company to pay the bill of exchange, was not undertaken to be put in writing at all, but that it was a separate and distinct agreement between the parties. Nearly all of the cases cited by the appellant, and nearly all of the cases which have been decided on this proposition, are cases where the terms of the written instrument itself are sought to be avoided or explained away by parol testimony; as, for instance, that a different amount was agreed upon; that the maker of the note signed in an individual capacity, when the agreement was, that he should sign in an official capacity, and cases of that kind, where the terms of the instrument itself would be overthrown if parol testimony were admitted. But here it is only by an implication, or by operation of law, that the drawer of the bill of exchange is responsible, and not by reason of the contract which was made between the drawer and the purchaser of the bill; and it seems to me that, if these technical implications are to exclude the real contracts between the parties, the rule will become a pitfall for the feet of the unwary and the unlearned in technical law. If the evidence admitted in this case is true (and it was found by the court to be true), a positive agreement was made between the appellant and respondent that this bill of exchange should be received by the appellant in full satisfaction, settlement, payment, and cancellation of the respondent's note and mortgage. The bill of exchange was accepted by the Ainslie Lumber Company before it was received by the appellant, and if such was the contract that was really made—it in no way controverting the terms of the written contract—the appellant ought to be bound by such oral agreement, and the judgment ought, therefore, to be affirmed.”

PAROL EVIDENCE TO VARY CONTRACT IMPLIED FROM WRITTEN INSTRUMENT.—Whatever the law implies from a contract in writing is as much a part of the contract as that which is therein expressed, and if the contract, with what the law implies, is clear, definite, and complete, it cannot be added to, varied, or contradicted by extrinsic evidence: *Fawcner v. Smith Wall Paper Co.*, 88 Iowa, 169; 45 Am. St. Rep. 230.

PAROL EVIDENCE of declarations by a payee to the maker of a note at the time of signing, that such signer shall not be called upon to pay the note, is incompetent: *Wright v. Remington*, 41 N. J. L. 48; 32 Am. Rep. 180.

NEIS v. O'BRIEN.

[12 WASHINGTON, 358.]

VENDOR AND PURCHASER—FORFEITURE OF PARTIAL PAYMENTS.—One who purchases personal property and pays part of the price, and afterward, without any fault of the vendor, refuses to receive it, or to pay the balance due, forfeits the whole of the amount so paid, although the vendor afterward sells the property to another, and thereby realizes a sum greatly in excess of that due him from the original purchaser.

Strudwick & Peters, for the appellant.

S. H. Piles and Stratton, Lewis & Gilman, for the respondent.

³⁵⁹ GORDON, J. Respondent's demurrer to the complaint in this case having been sustained in the court below, and appellant electing to stand upon his complaint, and refusing to plead over, judgment of dismissal was entered, from which judgment and order sustaining the demurrer this appeal is taken.

Briefly stated, the complaint shows the following facts: On the twenty-third day of June, 1891, the parties hereto entered into a written contract, whereby the respondent agreed to grow on his farm in King county, in the year 1891, twenty thousand pounds of hops of a specified quality, and to deliver them to the appellant, at a place designated in the contract, on or before the thirty-first day of October in that year. Upon his part, appellant agreed to pay respondent seventeen cents per pound for such hops, as follows: four cents per pound, or eight hundred dollars, at the time of the execution of the contract, four cents per pound, or eight hundred dollars, on the first day of September, 1891 (both of which payments he made), and the balance, or nine cents per pound, upon the delivery of the hops. The respondent complied with his contract in every particular, and at the time and place fixed by the contract tendered the hops to the appellant, who thereupon refused to receive them, or to pay the balance of the purchase price. Thereafter, respondent ³⁶⁰ resold said hops for thirteen and three-fourths cents per pound, whereupon appellant brought this suit to recover the sum of nine hundred and fifty dollars, the amount remaining in the hands of the respondent after reimbursing himself for the difference in price between the contract price and the price at which the hops were sold.

Appellant does not claim that the respondent did not keep the contract in every particular; he makes no claim that the hops tendered were not of the amount, kind, and quality called

for by the contract, or that they were not timely tendered at the place required by the contract. He alleges, however, that he refused to receive the hops from the respondent, "in good faith believing the said hops not to be of the quality and description mentioned in said contract, and believing that he had the right so to do."

The single legal proposition involved in this case is too well settled to warrant extended discussion. It was not the fault of the respondent that this contract was not fulfilled, but wholly the fault of the appellant. The respondent offered to perform all that the contract required of him, but the appellant, having made part performance, stopped short, and refused to proceed to the completion of the contract. Under such circumstances, it would, we think, be contrary to public policy to permit him to maintain this action. The sum which he seeks to recover was paid by him in part performance of the contract, and would have inured to his benefit but for his subsequent default. To permit the appellant to recover under the circumstances of this case, we think, would be establish a dangerous precedent, and in the language of the supreme court of Ohio in *Witherow v. Witherow*, 16 Ohio, 238: "The establishment of such a principle would have a tendency to encourage the violation of contracts—³⁶¹ to diminish, in the minds of contracting parties, a sense of the obligation which rests upon them to perform their agreements. Any principle which would have such an effect ought not to be recognized as sound law. It is the duty of courts to enforce the performance of contracts, not to encourage their violation."

In *Hansbrough v. Peck*, 5 Wall. 497, the court say: "No rule in respect to the contract is better settled than this: That the party who has advanced money, or done an act in part performance of the agreement, and then stops short, and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done": See, also, *Hapgood v. Shaw*, 105 Mass. 276; *Dula v. Cowles*, 7 Jones, 290; 75 Am. Dec. 463; *Pierce v. Jarnagin*, 57 Miss. 107; *Leonard v. Morgan*, 6 Gray, 412.

The reason assigned by appellant for refusing to receive the hops furnishes no sufficient excuse in law for his abandonment of the contract. The "quality and description" of the hops could have been determined by inspection, which it was his privilege to make, but which he neglected to avail himself of.

Nor was the respondent required to retain the property after appellant's refusal to accept it in accordance with the contract. It was his right to sell the property to another: *Ketchum v. Evertson*, 13 Johns. 359; 7 Am. Dec. 384; *McKinney v. Harvie*, 38 Minn. 18; 8 Am. St. Rep. 640.

The judgment appealed from will be affirmed.

Anders, Dunbar, and Scott, JJ., concur.

Hoyt, C. J., dissents.

VENDOR AND PURCHASER—FORFEITURE OF PARTIAL PAYMENTS.—One who purchases real property, and makes a deposit under an agreement that it shall be forfeited if he fails to comply with the terms of the sale, cannot recover it if the sale is not completed through his fault: *Donahue v. Parkman*, 161 Mass. 412; 42 Am. St. Rep. 415, and note. To the same effect see *Keddish v. Smith*, 10 Wash. 178; 45 Am. St. Rep. 781.

WEST v. CHEHALIS.

[12 WASHINGTON, 369.]

MUNICIPAL CORPORATIONS—RATIFICATION OF VOID INDEBTEDNESS.—Though the constitution of the state declares that no municipality shall become indebted to an amount exceeding one and a half per cent of its taxable property without the assent of three-fifths of the voters thereof, nor, with such assent, in an amount exceeding five per cent of such value, a statute authorizing the voters to ratify indebtedness which, when created, was void, because in excess of one and a half per cent of the taxable property, is not unconstitutional. Subsequent assent is equivalent to precedent authority.

MUNICIPAL BONDS.—AN ELECTION FOR THE PURPOSE OF RATIFYING WARRANTS ISSUED WITHOUT AUTHORITY RELATES to the date of such issue, and makes such warrants valid, if, at such issue, they, added to the other indebtedness, did not exceed the amount which the municipality was authorized to incur, though, at the date of the election, they, with other existing indebtedness, did exceed such amount.

W. A. Reynolds, for the appellant.

M. Yoder, Alfred E. Buell, and Crowley, Sullivan, & Grosscup, for the respondents.

369 GORDON, J. Appellant, as a taxpayer of the city of Chehalis, commenced this action in the lower court for the purpose of restraining the officers of said city from issuing bonds to fund certain warrants theretofore issued. The complaint shows that the city council, on August 20, 1894, passed an ordinance providing for an election to be held on October 2, 1894, at which election there was submitted to the voters of the city

three propositions, two to validate certain warrants, and the third to issue bonds to fund said warrants, if validated; that at the said election all the propositions submitted carried, more than three-fifths of the voters voting therefor. The complaint further alleges that all the warrants so sought to be validated were void, for the sole reason that the same were issued when the valid indebtedness ³⁷⁰ of said city, incurred for general municipal purposes, equaled one and one-half per cent of the assessment-roll, and without the assent of three-fifths of the voters of said city, voting at an election held for that purpose. It further alleges that on October 2, 1894, the date of said election, the assessment-roll of the city was five hundred and ninety-four thousand nine hundred and ten dollars, and the valid indebtedness of the city was ten thousand five hundred dollars, and that this valid indebtedness, together with the indebtedness sought to be validated, exceeded the constitutional limit of five per cent.

The respondents answered admitting all of the material allegations in the complaint, but setting up that all the warrants sought to be validated were issued between June 13, 1892, and January 23, 1893; that during said period, the assessment-roll of said city was six hundred and ninety-eight thousand four hundred and forty-seven dollars, and that these validated warrants, together with the valid indebtedness outstanding during that period, did not exceed five per cent of the assessment-roll in force at that time.

To this answer appellant filed a general demurrer, which was overruled, and, electing to stand thereon, final judgment was entered dismissing his complaint, from which judgment he appeals.

Section 6, article 8, of the constitution of Washington, is as follows: "No county, city, town, school district, or other municipal corporation shall, for any purpose, become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein, voting at an election to be held for that purpose, nor, in cases requiring such assent, shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and ³⁷¹ county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city

purposes; provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes; provided, further, that any city or town with such assent may be allowed to become indebted to a larger amount, but not exceeding five per centum additional, for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality."

At the time of their issuance, the warrants which were sought to be validated at this election, together with the valid outstanding indebtedness of said city, did not exceed five per cent of the value of the taxable property in said city, as ascertained by the last assessment for state and county purposes previous to the issuing of said warrants so sought to be validated. But it appears that, at the date of said election, the amount of said warrants, added to the valid outstanding indebtedness of said city, exceeded in the aggregate five per cent of the value of the taxable property of said city, as ascertained by the last assessment previous to said election. It is conceded that if the election is to be considered as relating back and giving force to the warrants as of the dates they were issued, so that the debt can be said to have been incurred at such dates, then the demurrer was properly overruled, and the judgment must be affirmed.

The act of February 10, 1893 (Laws 1893, p. 10), under authority of which the election in this case was held, is a substantial re-enactment of the act of March 7, 1891 (Laws 1891, p. 267); and this court held, in *Baker v. Seattle*, 2 Wash. 576, that the act ³⁷² of 1891 was not obnoxious to the provisions of section 6, article 8, of the constitution, and that the assent of the voters might be given to the creation of indebtedness after, as well as before, the attempted creation thereof. Upon the undisputed facts here, it is clear that it would have been competent and legal for the voters of the city to have given their consent to the incurring of the indebtedness for which these warrants were issued, provided such assent had preceded the incurring of the debt. In other words, the city authorities would, with the assent of the voters, have had a lawful right to issue these warrants, and, in that event, the warrants would have been absolutely legal and valid. Now, it seems to be well-settled law that subsequent assent is equivalent to precedent authority, and "operates upon the contract in the same manner as though the authority to make

the contract had existed originally": *Zottman v. San Francisco*, 20 Cal. 97; 81 Am. Dec. 96; *Mechem on Agency*, sec. 112; *Cook v. Tullis*, 18 Wall. 332; *La France Fire Engine Co. v. Davis*, 9 Wash. 600. This proposition has been recently reaffirmed by this court in *Williams v. Shoudy*, 12 Wash. 362, and the proposition last discussed in that case is so analogous to the sole question here presented that we deem it unnecessary to extend this opinion further.

We conclude that the warrants in question, as to both principal and interest, were validated as a result of the election held in the city of Chehalis on October 2, 1894, and the judgment of the superior court must be affirmed.

Hoyt, C. J., and Anders and Dunbar, JJ., concur.

THE PRINCIPAL CASE, in support of the rule that subsequent assent is equivalent to precedent authority, and operates upon the contract in the same manner as though the authority to make the contract had existed originally, refers to *Williams v. Shoudy*, 12 Wash. 362. In that case, the holder of certain warrants applied for a writ of mandate to compel their payment by the county treasurer, together with interest thereon from the several dates of presentment and indorsement. It was shown by the affidavit that, at the time of the issuing of the warrants, the indebtedness of the county was equal to one and a half per cent of the value of its taxable property; that after the issuing of the warrants, the county commissioners passed a resolution for the purpose of submitting to the voters of the county the question of the ratification of certain indebtedness, in which the warrants were included; that notice of this election was given in accordance with law; and that at such election more than three-fifths of the votes cast were in favor of validating and ratifying the warrants. The treasurer claimed that the warrants were not validated by the election, at least as to the interest on the warrants accruing prior to the holding of the election; but the court said: "We think that the legal effect of the vote validating these warrants is the same as if precedent authority to issue them had been expressly conferred by the voters. The right of the holder of a warrant legally issued to interest, after proper presentment and indorsement made, is as fixed and certain in law as the right to demand payment of the principal, and the effect of the ratification extended to both principal and interest—it went to the whole act, and validated the entire contract theretofore unauthorized."

RATIFICATION BY A MUNICIPAL CORPORATION will give validity to acts unauthorized at the time of their performance because the charter had not yet been published: *Mills v. Gleason*, 11 Wis. 470; 78 Am. Dec. 721, and note. Ratification is equivalent to previous authority: *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96, and note.

MUNICIPAL CORPORATIONS—VALIDATING VOID INDEBTEDNESS.—Although an indebtedness incurred by a city in Washington territory could not have been ratified by territorial law, because in excess of the limitation fixed by Congress, yet such indebtedness may be validated under an act of the state legislature, which has succeeded to all the powers of the territorial legislature and congress in the matter of jurisdiction over cities: *McBryde v. Montesano*, 7 Wash. 69. Compare *State v. Caron*, 6 Wash. 255, and also the case of *Baker v. Seattle*, 2 Wash. 576, which is cited in the opinion to the leading case.

MOYER v. VAN DE VANTER.

[12 WASHINGTON, 377.]

APPELLATE PROCEDURE.—AN EXCEPTION IN THE FOLLOWING FORM: "To these findings of fact and conclusions of law, and to each of them, the contestant excepts," is insufficient to assail any finding of fact, and the only question presented on appeal is, whether the facts are antagonistic to the conclusions of law and the judgment.

ELECTIONS.—THE FACT THAT A STAMP REQUIRED TO BE UPON BALLOTS BEFORE THEY WERE DELIVERED to the electors was not put thereon until afterward, provided they were stamped before being put in the ballot-box, is an irregularity merely, not requiring the exclusion of such ballots from the count.

DISFRANCHISING ELECTORS FOR FAILURE OF ELECTION OFFICERS.—A statute providing that on each official ballot the inspector or one of the judges shall write his initials, and that any ballot not indorsed with such initials shall not be counted, is unconstitutional, where the constitution declares that all male persons possessing certain qualifications shall be entitled to vote at all elections. The legislature cannot practically disfranchise the electors of a precinct who were themselves without fault.

THE FAILURE OF ELECTION OFFICERS TO HAVE BOOTHS ERECTED in the manner prescribed by law is an irregularity which does not vitiate the election.

Winsor, Bush & Morris, John B. Hart, and White & Munday, for the appellant.

Brady, Gay & McBride, Andrew F. Burleigh, and Struve, Allen, Hughes & McMicken, for the respondent.

379 **SCOTT, J.** The parties hereto were rival candidates at the last general election for the office of sheriff of King county. The county canvassing board found that respondent was entitled to the office, and declared him elected thereto, whereupon a certificate of election was issued to him. Within a few days thereafter, appellant filed a statement of contest, alleging matters to show that he had received the greatest number of legal votes, and was entitled to the office. Issue was taken by the respondent upon certain of the material matters alleged, and a trial was had, which resulted in favor of the respondent, and this appeal was taken therefrom.

A number of findings of fact were made by the lower court, which, with certain conclusions of law based thereon, were duly reduced to writing and made a part of the case. Whereupon appellant excepted as follows: "To these findings of fact and conclusions of law, and to each of them, the contestant excepts." An objection was made by the respondent to a consideration of any of the evidence introduced, or errors alleged with reference thereto, on the ground that no sufficient exception was taken to any fact found by the lower court, and, under repeated holdings

of this court heretofore, this objection must be sustained. As a consequence thereof, the case presented upon appeal is much abbreviated, many of the questions sought to be raised by the appellant are eliminated, and the only question left for our consideration is whether the facts so found by the lower court are antagonistic to the conclusions of law and judgment. Appellant's main contention in this respect is based upon the seventh finding, which is as follows:

"I find that in Franklin precinct there were one hundred and ninety-four ⁸⁸⁰ votes cast and counted for Aaron T. Van de Vanter, the defendant and contestee, and seventeen votes for William H. Moyer, the plaintiff and contestant, for said office of sheriff, which said votes entered into and formed a part of the total legal votes hereinbefore found by me to be cast for each of the said contestant and contestee, to wit, on the part of Van de Vanter, entered into and made a part of the four thousand three hundred and eighty votes so counted; on the part of Moyer, entered into and became a part of the four thousand three hundred and seventy-three so counted for him. I further find that the election officers of Franklin precinct failed to place upon any of said ballots the initials of the inspector or any judge thereof before the said ballot was deposited in the ballot-box. And I further find that a blank ballot was given to each and every elector without either the official stamp or the initials of an election officer thereon; that said elector took said ballot, and the same was marked by said elector and returned by him to the election officers, when, in the presence of the elector, the inspector of said election placed upon said ballot the official stamp, furnished for that purpose by the county auditor in pursuance of law, after which the said ballot was folded and placed within the ballot-box, wherein it was kept until, at the time of the counting by the election officers and at the close of the polls, all of the ballots of said precinct were counted and returned in a sealed box, by a special messenger, to the county auditor in the manner directed by law. I further find from the evidence and stipulations in this case that the ballots voted by the electors in each and every instance were placed in the said box, and that the said ballots had been safely kept, and was produced into this court as an original exhibit as evidence of the said recount. I further find that the election officers of Franklin precinct were in close and watchful attendance at the polls and of the ballot-box and ballots during the entire election; that no ballots were used, except those received from the election

judges or taken under their direction; that the election was held in an orderly manner; that the votes were counted and returned to the county auditor as required by law, and ³⁸¹ that the votes so returned were the votes actually cast at Franklin precinct at said election."

The important question to be determined is, whether the vote cast in this precinct could be counted, the initials of no one of the election officers having been written on any of the ballots. The law provides that there shall be printed on the back of the ballots, with the rubber or other stamp provided for that purpose, the designation "official ballot," the name or number of the election precinct, the name of the county, the date of the election, the name and official designation of the clerk who furnishes the tickets to the judges of election, and that the inspector or one of the judges shall also write his initials thereon: Gen. Stats., secs. 382, 384. The ballots bore the proper stamp, and the fact that it was not placed thereon before they were delivered to the electors, but was done when they were returned to be deposited in the ballot-box, was but an irregularity which could not vitiate them in the absence of any fraud.

Section 391 is as follows: "In the canvass of the votes, any ballot which is not indorsed, as provided in this chapter, by the official stamp and initials shall be void, and shall not be counted, and any ballot, or parts of a ballot, from which it is impossible to determine the elector's choice shall be void, and shall not be counted; provided, that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part."

If the language of this section can be given its full force, all the ballots cast in this precinct were rendered void by the failure of the election officers to comply therewith in not having one of their number write his initials thereon, and the effect of it would be to disfranchise all voters in that precinct for that election. ³⁸² The constitution, section 1, article 6, provides that all male persons of the age of twenty-one years or over, possessing certain qualifications specified, "shall be entitled to vote at all elections," and section 6 reads as follows: "All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot."

Can the legislature enact a law whereby election officers can practically disfranchise all the electors of a precinct, where the electors themselves are not at fault? If so, the constitutional

guarantee is of small consequence. Legislation going to promote the honesty of elections is most beneficial in character, and, as a means of securing this end, the general policy of the law is, that the ballot shall be a secret one, that it may not be known for which candidate any particular voter voted, in order that bribery may be prevented. Provision is also made as to the duties of election officers, to the end that a fraudulent canvass of the votes cast may be prevented. There is a good ground for recognizing a distinction between the obligations placed upon the individual voter and those matters which relate to the duties of election officers. Great care should be taken to distinguish between those requirements designed to prevent fraud, and which are necessary to the purity of elections, and those which, while designed for the same purpose, are not essential thereto, or we may overreach the salutary effect sought to be obtained from provisions of the character first mentioned by going so far in construing as valid and mandatory provisions of the second class as to open the very door to fraud that was sought to be closed thereby.

The individual voter may well be called upon to see ~~see~~ that the requirements of the law applying to himself are complied with before casting his ballot, and, if he should willfully or carelessly violate the same, there would be no hardship or injustice in depriving him of his vote; but if, on the other hand, he should, in good faith, comply with the law upon his part, it would be a great hardship were he deprived of his ballot through some fault or mistake of an election officer in failing to comply with a provision of law over which the voter had no control. It is also a question in which the public has a direct and important interest, for the loss of such vote may have a controlling effect upon a public matter. The constitutional provision aforesaid guarantees the right to vote, and this, of necessity, carries with it the right to have the vote counted. Of course, the manner of voting and canvassing votes must be subject to all reasonable legislative requirements. Many cases have been cited by counsel as supporting the positions taken by them respectively, and many of these involve a consideration of various phases of the law commonly known as the Australian Ballot Law in force here, but which is a comparatively new thing in this country. These cases cannot all be harmonized, but the general trend thereof has been to recognize a clear distinction between those things required of the individual voter, and those imposed upon election officers. There is a disposition to hold the former valid and

mandatory, but where there has been a substantial compliance with the law on the part of the individual voter, and it is made to appear that there has been, in fact, an honest expression of the popular will, there is a well-defined tendency to sustain the same, although there may have been a failure to comply with some of the specific provisions of the law upon the part of the election officers, or some of them. ³⁸⁴ Language may have been employed in some of the cases in conflict with this position, but, when such cases are examined with reference to the specific facts passed upon, it will appear that this distinction has been adhered to, and it may truly be said to be the one great underlying principle of all the cases. In case of a violation of the law on the part of an election officer, punishment may be provided therefor, and in this way the law can be rendered effectual without going to the extent of depriving the voter of his right to have his vote counted in consequence of such violation. In this connection, it may be well to note that while there is a punishment provided for depositing an unstamped ballot in the ballot-box by an election officer, there is none provided for failing to write his initials thereon. Section 389 of the General Statutes is as follows: "No inspector or judge of election shall deposit in any ballot-box any ballot upon which the official stamp, as hereinbefore provided for, does not appear. Every person violating the provisions of this section shall be deemed guilty of a misdemeanor."

He can deposit a ballot properly stamped, but without the initials, without incurring any penal liability. This may be an omission due to inadvertence upon the part of the lawmakers, but it is the law, nevertheless, and, if a ballot so deposited cannot be counted, a door is opened whereby great frauds may be committed with impunity, the voters of an entire precinct, as in this case, practically disfranchised, and the popular will nullified. It appears from the facts found that the vote of this precinct was honestly and fairly cast and counted, and that there was nothing upon the face of the ballots to indicate how any particular voter voted, and that the objections raised thereto apply to all the ballots cast for each of the candidates. ³⁸⁵ The failure to comply with the law appears to have been due to ignorance of its provisions on the part of the election officers. That the prohibition aforesaid against the counting of these votes, under the above circumstances, is an unreasonable one, and in conflict with the right guaranteed by the constitution, seems to us a clear proposition. Were we authorized to hold otherwise, such a holding would be subversive of the best interests of society, and might result in

great peril to our governmental structure. Such a holding is not necessary to preserve the purity of elections, for provision can be made for an investigation of charges of actual fraud upon the part of electors and election officers. It would be an interminable task to refer to each of the cases cited in detail, and we content ourselves with giving our conclusions drawn from all of them. No decision cited has gone to the extent that we are asked to go by the appellant in this case; and to accord with the general holdings of the courts, as we understand them in the light of what has actually been decided in the cases, we are compelled to hold that the provision aforesaid against counting ballots where no initials are placed thereon cannot be sustained, and the decision of that question sets this controversy at rest. The finding in question by the lower courts supports the conclusion of law based thereon and the judgment rendered.

The fact that the election officers failed to have booths erected which complied with the law, found in the eighth finding, was also an irregularity which would not vitiate the election. None of the other questions raised by appellant in the present aspect of the case are material to this controversy, as they relate to defects in particular votes cast in the various precincts and included in the other findings, and, in case any of ³⁸⁶ these votes were improperly counted, the court, in each instance, found a greater number were counted for the appellant than for the respondent, and the findings must be accepted as a whole.

It follows that the judgment must be affirmed.

Hoyt, C. J., and Anders, Dunbar, and Gordon, JJ., concur.

ELECTIONS—DISFRANCHISING VOTER FOR ERROR OF ELECTION OFFICER.—A ballot should not be rejected because it was indorsed by the clerk in the wrong place: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254, and especially note. So ballots deposited in the wrong box by the mistake or fraud of the election inspectors are valid, and should be counted: *State v. Horan*, 85 Wis. 94; 39 Am. St. Rep. 826; nor will errors of public officers in printing and preparing a ballot invalidate it: *Allen v. Glynn*, 17 Col. 338; 31 Am. St. Rep. 304; *Bowers v. Smith*, 111 Mo. 45; 33 Am. St. Rep. 491.

ELECTIONS—WHETHER VITIATED BY IRREGULARITIES OF OFFICERS.—Mere irregularities of election officers do not vitiate an election: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254, and note; *Allen v. Glynn*, 17 Col. 338; 31 Am. St. Rep. 304.

MARQUIS V. WILLARD.

[12 WASHINGTON, 528.]

OFFICIAL ACTS, WHAT ARE NOT.—If an officer having no process in his hands does an act which he has no right to do, he is not acting by virtue of his office, and therefore the sureties on his official bond are not answerable for such act.

THE SURETIES OF A CHIEF OF POLICE ARE NOT ANSWERABLE for his receiving and detaining persons in prison, when he acts without warrant or other process and without authority of law. His act, while it may have been done under color of his office, was not by virtue thereof, and is not an official act.

McLaughlin, Remsburg & Atkinson, and Thompson, Edsen & Humphries, for the appellants.

James Leddy, W. T. Scott, Frank A. Steele, and Gleason & Babcock, for the respondents.

528 HOYT, C. J. These actions were prosecuted against the respondent D. F. Willard, as principal, and the **529** other respondents, as sureties, upon the official bond of said Willard as chief of police of the city of Seattle. The superior court sustained the separate demurrers of the several respondents, and, the plaintiffs refusing to amend, judgments were entered dismissing the actions.

By stipulation of the parties, it is agreed that the investigation shall be confined to the ruling of the superior court upon the demurrers of the sureties, and, if it is found that such demurrers were rightfully sustained, that the judgments shall, as a whole, be affirmed, by reason of which we are not called upon to determine the question as to whether or not the complaints stated causes of action against the respondent Willard, and have only to determine their sufficiency as against the sureties in the said bond.

The acts of the respondent Willard, which are set out in the complaint and relied upon as constituting a breach of the conditions of the bond, consisted in receiving into the city prison, of which it was alleged he was, by virtue of his office, the keeper, the plaintiffs, who had been arrested by certain police officers of the city of Seattle, upon suspicion that they had been guilty of a crime, and detaining them in such prison for thirty-two hours without any warrant or other process authorizing him so to do.

It is not alleged in the complaints that the defendant Willard, as chief of police, or otherwise, arrested the plaintiffs, and the only connection which he is alleged to have had with the transactions was to receive them into the prison and detain them as

above stated. Did this action on his part make the sureties upon his official bond liable in damages to the plaintiffs?

It is open to serious question whether or not these acts were in any sense official acts. No case has been called ⁵³⁰ to our attention by appellants, nor have we been able to find one, which goes to the extent of holding that the keeper of a prison, in his official capacity as such, has any right to receive and detain any person without some warrant or other process authorizing him so to do; and if he has no such authority in the absence of process, if he receive a person without one, his act in so doing is not within the scope of his authority as keeper of the prison. If it be the rule that the keeper of a prison has no authority as such, except by virtue of process delivered to him, it must follow that, in receiving a prisoner without warrant from an officer who had arrested him, he would be acting in his private capacity as the agent of such officer. Until some case has been cited holding that the keeper of a prison has authority without process to receive and detain a person accused of crime, we should be strongly inclined to hold, were it necessary, that he has no such authority.

But in the cases at bar, it is not necessary for us to decide this question, for, even if it be conceded that the respondent Willard, as keeper of the prison, had authority in a proper case to receive and detain a person suspected of crime without process delivered to him for that purpose, the allegations of the complaint negative the conclusion that, in so receiving and detaining the plaintiffs, he acted by virtue of his office as chief of police and keeper of the prison. It is therein alleged that at the time he committed the acts complained of, there was no probable cause to believe the plaintiffs guilty of any crime. This being so, the respondent Willard, in receiving them without process, did not do so by virtue of his office, but at most only under color of office. This is conceded in the brief of appellant. Were such acts under color of office without ⁵³¹ process such official acts that the sureties upon his official bond are liable therefor?

There is great diversity of opinion upon the question as to the liability of sureties upon official bonds for acts done under color of office. The cases uniformly hold that such sureties are liable for wrongful performance of acts which, if properly done, would be justified by his official character. But upon the question as to their liability when the act is one which is a trespass from the beginning and unauthorized by his official character, however performed, there is great apparent want of harmony

among the cases. We say "apparent want of harmony," for the reason that, in our opinion, a careful examination will show that the conflict between the courts of most of the states is more apparent than real. The most of the cases which have held that the sureties were liable, even though the action of the officer was but a naked trespass, have been those in which the officer having process in his hands which authorized his acts as against the person or property therein named had wrongfully enforced the same against other property or a different person. It is clear that, in such a case, the process furnishes no justification to the officer, and he is as much a trespasser when, by virtue thereof, he levies upon the property of a person not named therein as he would have been without process. Yet many, and perhaps a majority, of the courts have held that the person whose property is so taken may maintain an action upon the official bond to recover damages therefor. And it is claimed on the part of the appellants that these cases are in point upon the question under consideration. All the cases cited by them, with the exception of those from the state of Iowa and, perhaps, one from the appellate court of the state of Illinois, were of this ⁵³² nature. And if, in our opinion, they were in point here, we should be inclined to agree with their contention, that the weight of authority required us to hold that the complaints stated causes of action against the sureties, though cases can be found from other courts of equal authority which hold that a levy upon the property of a third person, under process directed to the officer, will not authorize a recovery by such third person upon his official bond. But this class of cases, however decided, can have but little weight in deciding the question under consideration.

For an officer to serve process placed in his hands for that purpose is a strictly official act, and while such process would only justify him in a proper service of it, yet an improper service might be in an attempt to obey its command. It was as an officer that he received the process, and his acts under it, whether rightful or not, may well be held to have been by virtue of the office. But for the office, he would not have had the process. Without it, his acts would have been impossible. Hence, such acts might well be said to be official. And since, under all the authorities, the sureties are liable for acts done by virtue of the office, there is reason for holding them liable for the wrongful acts of the officer in the execution of process, even though, in doing them, he so departs from its command as to be a trespasser. But, when

an officer without process does an act which, under the law, he has no right to do, he cannot, in any proper sense, be said to be acting by virtue of his office, and it is going far enough to hold that, in so doing, he is acting under color of office. Such is the reasonable rule. When he has neither process in his hands authorizing him to act, nor any provision of law upon which he can found his action, there would seem to be no reason for ⁵³³ holding that the act was by virtue of his character as an officer. This conclusion is, in our opinion, sustained by the great weight of authority.

In *State v. McDonough*, 9 Mo. App. 63, the breach of the bond was charged to be that the principal, "without warrant or authority of law, as chief of police, and by virtue of, and under color of, his office, wrongfully and maliciously arrested the relator and imprisoned him, etc." A demurrer to the complaint was sustained, upon the ground that the act was not by virtue of his office, but was at most only by color of office. In the opinion occurs the following language: "The fact that, under color of his office, an officer does an act which is in its inception beyond, and out of, the line of his duty, does not show, or tend to show, that in any case he did not faithfully perform it; and if he does this, why should his sureties be held, whose obligation cannot be extended beyond the terms of the bond? Here, assuming what is stated to be true, the defendant, not in the manner of doing what it was his duty to do, but in taking any action, went outside of and beyond his duties. The act done was not within the scope of the bond. Thus, though it was done *colore officii*, the sureties are not liable."

In *Huffman v. Koppelkom*, 8 Neb. 344, it was contended that the sureties were not liable, because the act done was not by virtue of the office, but only under color of it, and the court, in its opinion, made use of the following language: "The second objection to this petition, and the one most relied on in this argument, is, that an action can be maintained on an official bond only for injuries done *virtute officii*, and not for the acts done *colore officii* merely. And so we believe the law to be according to the best authorities."

In *Ottenstein v. Alpaugh*, 9 Neb. 237, ⁵³⁴ it was again held by the same court, that the sureties on an official bond are answerable only for such acts of their principals as are done *virtute officii*.

In *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751, it was held that the sureties were only liable for acts done by virtue of the

office, and not merely for acts done under color of office. In this case, the facts showed that the officer was assuming to act under a writ of replevin, and under many authorities what he did would have been held to have been by virtue of his office; yet, notwithstanding this fact, that learned court held that his sureties were not liable. In *Gerber v. Ackley*, 32 Wis. 233, the same case had been before the court and a similar ruling intimated, but, owing to the state of the pleadings, not definitely announced. *State v. Mann*, 21 Wis. 684, is to the same effect.

In *McLendon v. State*, 92 Tenn. 520, the supreme court of Tennessee held that the sureties upon an official bond were not liable for the action of an officer under a process which was void upon its face.

As we have before suggested, a large number of cases have been cited by the appellant to establish a contrary doctrine, but a careful examination has satisfied us that, with the exception of those from the state of Iowa, they tend slightly, if at all, to overthrow the authority of the cases cited by the respondents. They nearly all belong to the class which, as we have seen, are not in point where the facts are as in the case at bar, and some of them show upon their face that the court had in mind the distinction between the case under consideration and one where the facts were as in these.

The case of *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257, furnishes an example ⁵³⁵ of the cases of this kind. It was there held that the sureties were liable for a mistake made by an officer in the service of process placed in his hands; yet that the court intended to announce a principle which would apply where the facts were as in the cases at bar, is directly negatived by the incorporation in its opinion of the following language: "It is contended by counsel for the appellant that, in view of the facts disclosed by the verdict, the constable was acting *virtute officii*, not merely *colore officii*. With this contention we are in accord. The constable had a legal process, and his sole purpose seems to have been the execution of the command which it carried to him. There is some conflict of authority as to whether or not there is a right of action on the bond of a ministerial officer for an unlawful act done *colore officii*. But when the officer is acting *virtute officii*, the authorities all agree that a suit will lie upon his bond."

The case of *Ex parte Reed*, 4 Hill, 572, is relied upon by the appellants, and has been cited as authority in nearly all of the cases

cited by them. An examination of the facts upon which it was decided will show that the officer was acting under process. For that reason, this case and those founded upon it are not in point upon the question here presented.

The ruling of the superior court was in accordance with reason, and is sustained by a decided weight of authority.

The judgments will be affirmed.

Anders, Gordon, and Scott, JJ., concur.

Dunbar, J., dissents.

OFFICIAL BONDS—FOR WHAT ACTS SURETIES LIABLE.—The sureties on the bond of a public officer are not liable for an extraofficial act or undertaking of their principal: *Wilkes-Barre v. Rockafellow*, 171 Pa. St. 177; ante, p. 795. To render sureties liable on an official bond, there must be a breach of some duty enjoined by law upon the officer as such: *Extended note to Commonwealth v. Cole*, 46 Am. Dec. 509.

KUHN v. PORT TOWNSEND.

[12 WASHINGTON, 605.]

MUNICIPAL CORPORATIONS—RIGHT TO QUESTION EXISTENCE OF.—A private citizen cannot question the right of a municipal corporation to exercise the authority, powers, and functions of an incorporated city; nor can he, in a private action, question the due annexation to it of territory over which it has assumed to exercise jurisdiction for several years, under proceedings taken to effect such annexation.

TAXATION, COLLATERAL ATTACK.—The collection of taxes cannot be restrained, in an action brought by a private citizen, on the ground that the property taxed had not been duly annexed to a municipality, where proceedings had been taken under authority of law looking to such annexation, and had been declared to be carried, and the municipality had exercised jurisdiction for several years over the territory claimed to have been annexed.

ESTOPPEL TO DENY MUNICIPAL AUTHORITY.—One who participated in proceedings for the annexation of territory to a municipality, and subsequently recognized the jurisdiction of the municipal authorities, and acquiesced for several years in their claim that such annexation had been effected, is estopped from thereafter questioning it.

Morris B. Sachs, for the appellant.

Trumbull & Trumbull, for the respondent.

605 GORDON, J. This was an action brought in the superior court of the county of Jefferson for the purpose of restraining the collection of taxes assessed against the lands of plaintiff for municipal purposes. The ground upon which relief is sought is,

that the property against which said taxes are levied is situated within that portion of territory attempted to be annexed to the city of Port Townsend by virtue of certain proceedings upon the part of the officers of said city, which proceedings he alleges were had and taken without authority of law, and are, therefore, void. Issue of fact was joined by answer and reply, and thereafter, upon motion of the respondents, judgment was rendered upon the pleadings in favor of respondents, from which judgment this appeal is prosecuted.

The city of Port Townsend was incorporated under an act of the legislature of the territory of Washington, ⁶⁰⁰ approved November 28, 1881. The theory of the complaint, and the sole ground upon which the relief is sought, is that the attempted annexation proceedings were void. The prayer of the complaint is, "that upon the final hearing herein, the court will order and declare the said attempted annexation of said property so, as hereinbefore set forth, attempted to be annexed to said city of Port Townsend, and the acts and doings of said city of Port Townsend in relation thereto, void and of no effect."

Various errors are assigned in the appellant's brief, relating principally to matters within the discretion of the lower court, all of which, save those hereinafter noticed, were abandoned upon the oral argument in this court, and, although we have examined and considered them, we do not think that any of them are of sufficient importance to warrant a reversal of the cause. Section 9 of the act of March 27, 1890, being section 501 of the General Statutes, is as follows: "The boundaries of any municipal corporation may be altered, and new territory included therein, after proceedings had as required in this section. The council, or other legislative body of such corporation, shall, upon receiving a petition therefor, signed by not less than one-fifth of the qualified electors thereof, as shown by the vote cast at the last municipal election held therein, submit to the electors of such corporation, and to the electors residing in the territory proposed by such petition to be annexed to such corporation, the question whether such territory shall be annexed to such corporation and become a part thereof."

The section further provides for the calling of a special election to be held for that purpose and giving notice thereof, and provision is made for canvassing and declaring the result. Continuing, the section provides that ⁶¹⁰ "if it shall appear upon such canvass that a majority of all the votes cast in such territory,

and a majority of all the votes cast in such corporation, shall be for annexation, such legislative body shall, by an order entered upon their minutes, cause their clerk, or other officer performing the duties of clerk, to make and transmit to the secretary of state a certified abstract of such vote, which abstract shall show the whole number of electors voting in such territory, the whole number of electors voting in such corporation, the number of votes cast in each for annexation, and the number of votes cast in each against annexation."

It then provides that "from and after the date of the filing of such abstract, such annexation shall be deemed complete, and thereafter such territory shall be and remain a part of such corporation."

It is alleged in the complaint that this section does not apply to and has no relation whatsoever to the city of Port Townsend. Learned counsel for the appellant, in his very able and exhaustive brief, has failed to advance any reasoning in support of the position thus assumed.

A similar question was involved in the case of *State v. Warner*, 4 Wash. 773, and of that section this court there said: "In our judgment, there can be no doubt that the intention was to make it apply to municipal corporations of every class, whether existing under special territorial charters, or under the constitution and subsequent laws of the state." Further consideration convinces us that this is the true meaning of that section.

It appears from the complaint in this action that in September, 1890, a petition was presented to the council of the said city, signed by a number of persons, ⁶¹¹ requesting that said outlying territory (describing it, and which includes the lands of appellant) be annexed to the city of Port Townsend, and that the city limits be extended so as to include the same. Continuing, the complaint alleges, that "the said city council, in pursuance thereof, and in attempting to annex the said property and extend said boundaries, caused a notice of a special election to be published." (Then follows the notice, the sufficiency of which is not questioned.) "That said city council caused said notice of said election to be published for the time required by law in a newspaper printed and published within the limits of the city of Port Townsend as required by the acts of the legislature aforesaid." Further it alleges that, "on October 27, 1890, an election was held under and by virtue of said notice, and thereafter the council proceeded

that the property against which said taxes are levied is situated within that portion of territory attempted to be annexed to the city of Port Townsend by virtue of certain proceedings upon the part of the officers of said city, which proceedings he alleges were had and taken without authority of law, and are, therefore, void. Issue of fact was joined by answer and reply, and thereafter, upon motion of the respondents, judgment was rendered upon the pleadings in favor of respondents, from which judgment this appeal is prosecuted.

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Various errors are assigned in the appellant's brief, relating principally to matters within the discretion of the lower court, all of which, save those hereinafter noticed, were abandoned upon the oral argument in this court, and, although we have examined and considered them, we do not think that any of them are of sufficient importance to warrant a reversal of the cause. Section 9 of the act of March 27, 1890, being section 501 of the General Statutes, is as follows: "The boundaries of any municipal corporation may be altered, and new territory included therein, after proceedings had as required in this section. The council, or other legislative body of such corporation, shall, upon receiving a petition therefor, signed by not less than one-fifth of the qualified electors thereof, as shown by the vote cast at the last municipal election held therein, submit to the electors of such corporation, and to the electors residing in the territory proposed by such petition to be annexed to such corporation, the question whether such territory shall be annexed to such corporation and become a part thereof."

The section further provides for the calling of a special election to be held for that purpose and giving notice thereof, and provision is made for canvassing and declaring the result. Continuing, the section provides that ⁶¹⁰ "if it shall appear upon such canvass that a majority of all the votes cast in such territory,

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to declare the result, and made its finding and declaration in respect thereto, showing a majority of three hundred and forty-one in favor of annexation, and thereupon the city council made an order that the city attorney and clerk draw an abstract to be filed with the secretary of state." Continuing, the complaint alleges, "that ever since the finding and declaration aforesaid as to the canvassing of said vote, and the drawing and filing of the abstract aforesaid, with the secretary of state, the said city of Port Townsend has assumed and taken control of, and legislated for, and assessed taxes for general and special purposes upon and against, all the property, both real and personal, within the limits described in and mentioned in said notice of election."

It is alleged in the answer, and admitted by the reply, that the plaintiff was a signer of the petition already mentioned, which was presented to the council asking for such annexation. It is also admitted that since ⁶¹²said attempted annexation various streets have been laid out within the territory so annexed by authority of said city, and improvements made thereon aggregating thousands of dollars; that the appellant also signed some of the petitions to the council praying for said improvements and the grading of said streets. It also appears that, during the years 1891-92 he furnished the assessor of the city with a detail list of all his property within the limits thereof, including in said list his property situated in the annexed portion of said city.

Upon the facts above noticed, we think the judgment appealed from must be affirmed for two principal reasons, viz: 1. A private citizen cannot question the right of a municipal corporation to exercise the authority, powers, and functions of an incorporated city; this can be done only in a direct proceeding, prosecuted by the proper public officers of the state; 2. The appellant is precluded by his conduct from maintaining the present action.

The following authorities, and many others that might be cited, support the first proposition above laid down: *Voss v. Union School District*, 18 Kan. 467; *School District v. State*, 29 Kan. 57; *Graham v. Greenville*, 67 Tex. 62; *Stockle v. Silsbee*, 41 Mich. 615; *Clement v. Everest*, 29 Mich. 19; *Mullikin v. Bloomington*, 72 Ind. 161; *Atchison etc. R. R. Co. v. Wilson*, 33 Kan. 223.

In the case last above cited the court say: "To maintain this suit, and to defeat the tax complained of, the plaintiff must establish, and the court must determine, that the organization of the district is illegal. This cannot be done in the present action. The legality of the organization cannot be questioned in a col-

lateral proceeding, nor at the suit of a private party. The organization cannot be attacked, nor any action taken affecting the existence of the corporation, ⁶¹³ except in a direct proceeding prosecuted at the instance of the state by the proper public officer."

In *Clement v. Everest*, 29 Mich. 19, it is said: "It would be dangerous and wrong to permit the existence of municipalities to depend on the result of private litigation. Irregularities are common and unavoidable in the organization of such bodies; and both law and policy require that they shall not be disturbed, except by some direct process authorized by law, and then only for very grave reasons."

In *Mullikin v. Bloomington*, 72 Ind. 161, the court say: "As there is a statute under which the town might have become a city, and as the complaint shows an attempt to comply with this statute, and shows, also, acts performed after such attempt (conceding that the statute was not strictly complied with), as a city corporation, and that powers were asserted under the general act for the incorporation of cities, a citizen, in his own behalf, cannot attack the right of the corporation to exercise the functions, powers, and authority of an incorporated city. In such cases as the present, the right to exercise the powers and authority of a corporation can only be questioned by a proceeding in the nature of a quo warranto, filed by some one possessing competent authority, in behalf of the state."

Without multiplying authorities upon a proposition so generally recognized and understood, we think it can be safely said that where the legislature has conferred upon a city the power to enlarge its corporate limits, and, having jurisdiction of the general subject matter thereof, the city authorities proceed to act and to declare a result, and thereafter to act upon such result, the legality of such acts cannot be called in question in a collateral proceeding. So here, the subject of annexing territory to the city was one over which the council of the city of Port Townsend had jurisdiction ⁶¹⁴ by virtue of section 9 of the act of March 27, 1890. That jurisdiction was brought into exercise by the filing of the petition, regardless of whether the petition complied with the statute, and regardless of any errors or irregularities in the proceedings of the council.

"The power to hear and determine a case is jurisdiction; it is 'coram judice,' whenever a case is presented which brings this power into action": *United States v. Arredondo*, 6 Pet. 691.

In *Morrow v. Weed*, 4 Iowa, 77, 66 Am. Dec. 122, it was held: "If there be a petition, or the proper matter of that nature, to call into action the power or jurisdiction of the court, its sufficiency cannot be called in question in a collateral proceeding." To the same effect is the very well-considered case of *Terre Haute v. Beach*, 96 Ind. 143.

The objections urged against the proceedings of the council of the respondent city do not go to any question of jurisdiction, but constitute mainly irregularities and informalities not affecting jurisdiction, and afford no ground for collateral attack.

The appellant's participation in the annexation proceedings, his subsequent recognition of the jurisdiction of the city authorities, his acquiescence in the result reached and declared by them, and his gross laches in the assertion of his rights, constitute an equitable bar to the cause of action which he, after the lapse of nearly three years, first attempted to assert; and it would be immaterial to the result were we to determine that his conduct amounted to a ratification or an election, or requires the application of the doctrine of estoppel: *Strosser v. Fort Wayne*, 100 Ind. 443; *Hayward v. National Bank*, 96 U. S. 611; *Graham v. Greenville*, 67 Tex. 62.

¶15 In *Strosser v. Fort Wayne*, 100 Ind. 443, it is said: "If a taxpayer were permitted to long acquiesce in the order of annexation and then secure its overthrow, great confusion would ensue, and much injustice be often done. High considerations of public policy and of justice require that a taxpayer, who is notified that a public corporation claims to have extended its limits so as to take in his property, should act with promptness and proceed with diligence, if he would resist the attempted annexation."

We think the lower court was right in giving judgment for the respondents and in denying appellant's application for leave to amend, and said judgment is affirmed.

Hoyt, C. J., and Anders, Dunbar, and Scott, JJ., concur.

ESTOPPEL.—LACHES ON THE PART OF TAXPAYERS OF A MUNICIPALITY in objecting to or resisting a public improvement may estop them from afterward denying liability for such improvement, if during their inaction some person has incurred liabilities in good faith: *Hutchinson v. Board of Commrs.*, 48 Kan. 70; 30 Am. St. Rep. 273, and note. So a party contracting with a city under a contract which is ultra vires, but not prohibited, is estopped, when sued upon the contract, from setting up the plea of ultra vires to escape liability, and to enable

him to retain benefits received under the contract: *St. Louis v. Davidson*, 102 Mo. 149; 22 Am. St. Rep. 764, and note, with the cases collected.

TAXES—RESTRAINING COLLECTION OF.—Owners of taxable property can maintain a suit to annul illegal acts of municipal officers, when such acts will increase the municipal taxes, and the state is not a necessary party: *Newmeyer v. Missouri etc. R. R. Co.*, 52 Mo. 81; 14 Am. Rep. 394, and note.

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ABANDONMENT.

ABANDONMENT OF LAND on the part of one who has purchased and paid for it, but has not received a conveyance of the title, is not inferable from his absence therefrom for a number of years. (*Chapman v. Chapman*, 84.)

See *Waters*, 13-17.

ACCESSARIES AND ACCOMPLICES.

1. **THE TESTIMONY OF AN ACCOMPLICE**, though uncorroborated, may be sufficient to sustain a conviction for murder, but, in such cases, the trial court should proceed with the greatest caution. (*Campbell v. People*, 134.)

2. **THE TESTIMONY OF AN ACCOMPLICE** is not sufficient to sustain a conviction for the alleged murder of her child, if it appears that she is an ignorant and depraved woman, having no conception of the nature of an oath or of the punishment to which she might be subjected for testifying falsely, that she was herself accused of the murder, that she felt aggrieved by the marriage of the defendant to another, and that she had made statements out of court inconsistent with the defendant's guilt, and had, in her testimony, been contradicted in some respects by several other witnesses. (*Campbell v. People*, 134.)

ACCOMMODATION.

See *Negotiable Instruments*, 6-8.

ACCOUNTS.

See *Bills of Particulars*; *Trial*, 1.

ACCRETION.

See *Waters*, 3-5.

ACTIONS.

1. **ACTIONS—SPECIAL APPEARANCE.**—A party may appear specially in an action for the purpose of having the service of summons upon him, and an order continuing the action against him in a representative capacity, vacated, without giving the court jurisdiction to render a personal judgment against him. (*White v. Johnson*, 726.)

2. **PRACTICE.—IF SPECIAL APPEARANCE TO OBJECT TO JURISDICTION** is, after the objection is overruled, followed by a general appearance, the question of jurisdiction is not open to collateral attack. (*Parsons v. Venzke*, 669.)

ADVERSE POSSESSION.

See *Vendor and Purchaser*, 4; *Waters*, 18.

AFFIDAVITS.

1. **AN AFFIDAVIT IS SIMPLY** a declaration on oath, in writing, sworn to by a party before some person having authority under the

law to administer oaths, and need not be entitled in any particular cause, or in any particular way, or be preceded by any caption. (*Hertig v. People*, 162.)

2. AN AFFIDAVIT HAVING NO VENUE, but subscribed by a notary public of the county, is good, for the court will take judicial notice that he is a notary of the county, and will presume that he administered the oath only in the county in which he was authorized to act. (*Hertig v. People*, 162.)

See Attachment, 1.

AGENCY.

1. PRINCIPAL AND AGENT, WHO ARE NOT.—Vendors of live-stock, who deliver it in a pen of a railway corporation for shipment, according to the stipulations of their contract of sale, are not, in so doing, agents of the purchasers, so that the latter are chargeable with the contributory negligence of the former in not discovering that such pen contained salt water in such quantity and condition as to be dangerous to such stock. (*Norfolk etc. R. R. Co. v. Harman*, 855.)

2. AGENCY—APPOINTMENT AND AUTHORITY OF SUB-AGENTS.—As a general rule, an agent has no right to delegate his authority to a subagent without the consent of his principal. If, in the absence of such consent, he does delegate his authority, the subagent whom he appoints will be regarded as his agent, and not the agent of the principal. (*Davis v. King*, 104.)

3. AGENCY—IMPLIED AUTHORITY TO EMPLOY SUB-AGENT.—The consent of a principal to his agent to employ a subagent may be given expressly or by implication. (*Davis v. King*, 104.)

4. AGENCY—LIABILITY OF AGENT FOR ACTS OF SUB-AGENT.—If an agent has the consent and authority of his principal to employ a subagent, he may employ one; and if, in so doing, he, in good faith, selects a suitable and proper subagent, he is not responsible to his principal for the acts and omissions of such subagent. (*Davis v. King*, 104.)

5. AGENT, LIABILITY FOR SUBAGENT.—If a subagent, employed with the consent, express or implied, of the principal to collect a note, wrongfully returns it to the maker, who destroys it, giving a renewal note in place thereof to the subagent, the principal agent is not answerable for the act of the subagent in surrendering the note. (*Davis v. King*, 104.)

See Brokers; Corporations, 1, 12; Evidence, 1, 6; Insurance, 14, 15; Sales, 8.

ALIENATION OF AFFECTIONS.

See Husband and Wife, 1-6; Witnesses, 4.

AMENDMENT.

See Pleading, 7.

ANNEXATION.

See Municipal Corporations, 2.

APPEAL.

1. COURTS — JURISDICTION OF — APPELLATE PROCEDURE.—If the amount involved in an action was greater than one thousand dollars, and an appeal was taken to the appellate court, where the judgment was reduced below that sum, and an appeal

is then taken by the appellant to the supreme court, the latter has jurisdiction though the decision of the appellate court has reduced the amount in controversy to a sum less than one thousand dollars. (Chicago etc. R. R. Co. v. Davis, 143.)

2. APPEAL—WAIVER OF.—One cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by the reversal of the judgment. (Tyler v. Shea, 660.)

3. RIGHT OF APPEAL IS NOT WAIVED by accepting a benefit under a judgment which the appellate court has power to modify, so as to make it more favorable to the appellant, without reversing or modifying that part of it in his favor, and of which he has secured the benefit. In such case, the appeal can be taken only from the adverse portion of the judgment. (Tyler v. Shea, 660.)

4. APPEAL, WAIVER OF.—One who appeals from an order refusing an execution to put him in possession of land, on the ground that defendants are in default, waives his right to appeal for a new trial in the appellate court, from a prior judgment declaring that such defendants are entitled to a deed of the land from him, on payment of a certain amount of money within a specified time, and that such appellant shall be immediately entitled to exclusive possession of the land, in case of their default. (Tyler v. Shea, 660.)

5. APPEAL—QUESTIONS CONSIDERED.—If a party appeals for a new trial of the case in the appellate court, the whole case is open to investigation, and not merely that part of the judgment adverse to the appellant. (Tyler v. Shea, 660.)

6. NEGLIGENCE—QUESTION OF FACT—REVIEW ON APPEAL.—All that the law requires of one about to pass over a railroad crossing, whether he is a trespasser or licensee, or there by implied invitation, is for him to use ordinary care to avoid danger and injury to himself. Whether he performs this duty to himself is a question of fact, the determination of which is not reviewable on appeal. (Pomponio v. New York etc. R. R. Co., 124.)

7. VOID JUDGMENTS.—Affirmance of a void judgment on appeal does not impart any validity to it, especially if it is affirmed on grounds not touching, but overlooking, its invalidity. (Pioneer Land Co. v. Maddux, 67.)

8. VOID JUDGMENTS—COLLATERAL ATTACK.—If a judgment is void, its validity is not affected by the denial of a motion to vacate it, made many years after its rendition, nor by the affirmance on appeal of the order denying the motion to vacate. Such affirmance is not conclusive of the validity of the judgment as against a collateral attack. (Pioneer Land Co. v. Maddux, 67.)

9. APPELLATE PRACTICE—MOTION FOR VENIRE DE NOVO is correctly overruled, if the special findings are not ambiguous, uncertain, nor contradictory, and embrace all the issues and are sufficient to sustain the judgment. (Bowell v. Dewald, 240.)

10. APPELLATE PROCEDURE.—AN EXCEPTION IN THE FOLLOWING FORM: "To these findings of fact and conclusions of law, and to each of them, the contestant excepts," is insufficient to assail any finding of fact, and the only question presented on appeal is, whether the facts are antagonistic to the conclusions of law and the judgment. (Moyer v. Van de Vanter, 900.)

11. APPELLATE PROCEDURE—WAIVER.—If, from the record, it appears that a demurrer to a replication was overruled, and, by agreement of the parties, the issues joined were submitted to the court for trial, it will be presumed that, if any error occurred in the action of the court on the demurrer, such error was waived. (B. S. Green Co. v. Blodgett, 146.)

12. APPELLATE PRACTICE.—IF A DEMURRER to a bad paragraph of a complaint containing one or more good paragraphs is overruled, it must be presumed harmful and be held reversible error on appeal, unless it affirmatively appears by the record that the judgment rested exclusively upon the good paragraphs. If it appears from questions answered by the jury that the verdict is based solely upon the good paragraphs, the overruling of the demurrer is a harmless error. (Taylor v. Wootan, 200.)

13. APPEAL.—IT WILL BE PRESUMED, on appeal, that a ruling of the trial court sustaining an objection to a question asked a witness was correct, in the absence of any showing to the contrary. (Adams v. Main, 266.)

14. APPELLATE PRACTICE.—IRRELEVANT EVIDENCE, if admitted, is immaterial and not reversible error, if its admission is harmless, and the special verdict shows that the jury based its findings on other evidence. (Chicago etc. R. R. Co. v. Wolcott, 320.)

15. CHANCERY PRACTICE—WEIGHT OF EVIDENCE.—If the testimony is oral, and is heard by the chancellor in open court, the appellate court will not reverse his findings of fact, unless he has palpably erred. (Shults v. Shults, 188.)

16. APPELLATE PRACTICE.—Admission of evidence alleged as error cannot be considered on appeal, if no ground of objection is stated at the trial. (Bowell v. Dewald, 240.)

See Instructions; New Trial.

APPEARANCE.

See Actions.

ARREST.

1. ARREST WITHOUT WARRANT.—THE AUTHORITY OF A CONSTABLE, SHERIFF, OR OTHER PEACE OFFICER to arrest without process, upon reasonable suspicion, one who is charged with the commission of a felony, and to retain him for a reasonable time, until a warrant can be procured, is well established. (Diers v. Mallon, 598.)

2. ARREST WITHOUT WARRANT.—A PEACE OFFICER IS NOT LIABLE for making an arrest, though the person arrested is innocent of the crime for which he is arrested, if such arrest is made upon reasonable ground of belief that the person arrested is guilty. (Diers v. Mallon, 598.)

3. JURY TRIAL—QUESTION OF LAW.—If the question is, whether a person, arrested by a peace officer without a warrant, was detained an unreasonable length of time, it may be determined by the court, as a matter of law, if there is no conflict in the evidence upon the subject. (Diers v. Mallon, 598.)

4. PROBABLE CAUSE FOR AN ARREST is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. (Diers v. Mallon, 598.)

5. PROBABLE CAUSE FOR AN ARREST IS ESTABLISHED, as a matter of law, by evidence showing that a person then in custody, charged with the commission of a murder, asserted that he was procured to commit it by the person arrested; that the decedent in his lifetime had expressed fears of being murdered by that person, who was also represented to be of a bad and dangerous character. (Diers v. Mallon, 598.)

6. REASONABLE GROUND FOR ARREST, WHEN A QUESTION OF LAW.—If there is no conflict in the evidence, the court may, as a matter of law, instruct the jury that there was reasonable ground

for the belief, on the part of an officer making an arrest, that the party arrested was guilty of the crime for which he was apprehended. (*Diers v. Mallon*, 598.)

7. DUTY OF OFFICER TO INQUIRE RESPECTING REPUTATION OF PERSON ARRESTED.—An officer knowing that a murder has been committed, and receiving information sufficient to raise an honest belief on his part, as a prudent man, that a particular person is guilty thereof, cannot be adjudged negligent, because he did not make inquiries among the neighbors of the accused as to his habits, standing, and character before arresting him, without first having a warrant commanding such arrest. (*Diers v. Mallon*, 598.)

8. THE DETENTION OF A PRISONER, ARRESTED WITHOUT WARRANT on a charge of murder, is not unreasonable, though he is not taken before the magistrate until the third day after his arrest, if the first day was Sunday, and the arresting officer at once called the attention of the prosecuting attorney to the matter, detailing the facts and requesting that a complaint be prepared and a warrant issued, and such attorney promised to at once comply with the request. (*Diers v. Mallon*, 598.)

9. A SHERIFF OR OTHER PEACE OFFICER HAS A DISCRETION RESPECTING THE MEANS to be adopted to safely keep a person arrested by him without warrant, but with reasonable ground to believe him to be guilty of committing a felony, and though he was put in irons, and is afterward shown to have been innocent, the officer is not liable in damages, if the precautions adopted were, at the time, honestly believed by him to be necessary and reasonable. (*Diers v. Mallon*, 598.)

ASSESSMENT.

See Insurance, 17, 19.

ASSIGNMENT.

See Guaranty, 3; Mortgages, 4-6; Railroads, 14.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—PREFERENCES.—An insolvent debtor may secure one creditor in preference to another, except when he executes an assignment for the benefit of his creditors. (*Cutter v. Pollock*, 644.)

2. PREFERENCE BY MORTGAGE.—The execution, by an insolvent debtor, of chattel mortgages on substantially all of his property, securing and preferring certain of his creditors, to the exclusion of others, is valid, and does not constitute a general assignment for the benefit of creditors, although the effect of giving such mortgages is to prevent the mortgagor from continuing his business. (*Cutter v. Pollock*, 644.)

3. EXEMPTIONS.—An assignor in an assignment for the benefit of creditors, who points out to the assignee certain property which he desires to have set aside to him as exempt, and which the assignee promises to so set aside at the time of the appraisement, may, if he is prevented by sickness from attending such appraisement, still claim his right to the exemption, and if the whole property is sold by the assignee, the assignor may recover the amount of his exemption out of the assets of the property. (*Doherty v. Ramsey*, 223.)

4. EXEMPTIONS.—If an assignor in an assignment for the benefit of creditors substantially pursues the method prescribed by statute in asserting his right to his exemption, and the assignee refuses to set off the exempt property to him, but converts it into the trust fund, the assignor is equitably entitled to the proceeds of the

property which should have been set apart to him, and it is the duty of the court, on proper application, to order the assignee to turn such proceeds over to the assignor. (*Doherty v. Ramsey*, 223.)

5. **EXEMPTIONS.**—If an assignor, prior to making an assignment for the benefit of creditors, transfers a large amount of money in fraud of them, but subsequently executes a voluntary written order surrendering all of such money to the assignee, he still has a right to claim his exemption out of the property assigned, and cannot be compelled to take such exemption out of the money fraudulently transferred. (*Doherty v. Ramsey*, 223.)

6. **EXEMPTION — WAIVER.** — The exemption to which an assignor in an assignment for the benefit of creditors is entitled, cannot be waived by him by contract made prior to the execution of the assignment. (*Doherty v. Ramsey*, 223.)

7. **EXEMPTIONS—FRAUD OF ASSIGNOR.**—If the right to an exemption is conferred by express statutory terms, and does not depend upon an enlargement of statutory provisions by equitable construction, the previous fraud of a debtor in transferring, or withholding property subject to execution does not defeat his right to claim an exemption out of property assigned for the benefit of his creditors. (*Doherty v. Ramsey*, 223.)

8. **FRAUDULENT TRANSFERS.**—By the recording of an assignment for the benefit of creditors, the legal title to all of the property owned by the assignor at that time vests in the assignee, including any and all property that may have been sold, conveyed, or assigned by the assignor with the intent to defraud his creditors. (*Doherty v. Ramsey*, 223.)

ATTACHMENT.

1. **ATTACHMENT.—AN AFFIDAVIT** for attachment, stating that the defendant is not a resident of the state, or has departed therefrom, "without stating that such departure was with intent to defraud his creditors, or to avoid the service of summons," is insufficient to confer jurisdiction upon the court, and, in the absence of personal service of the summons, all proceedings thereunder are coram non judice. (*Birchall v. Griggs*, 654.)

2. **ATTACHMENT, VOID—JURISDICTION—SUBSTITUTION OF PARTIES.**—Under a statute giving the court jurisdiction in all proceedings from the time summons is served, "or the allowance of a provisional remedy," it has no jurisdiction, under a void attachment to make substitution of, and to continue the action against, the personal representative of a deceased defendant. (*White v. Johnson*, 728.)

3. **ATTACHMENT, ISSUANCE OF, BEFORE SUMMONS.**—Under a statute allowing the plaintiff, "at the time of issuing the summons, or at any time afterward," to have the property of the defendant attached, the summons must be issued at the time of, or prior to, the issuance of the writ of attachment. If the writ is issued before the summons, it is void. (*White v. Johnson*, 728.)

4. **CARRIERS—GARNISHMENT OF.**—Property in the possession of a common carrier, awaiting shipment, is subject to garnishment at any time before its transit has commenced. (*Landa v. Holck*, 459.)

5. **CARRIERS.—GARNISHMENT** of property in the possession of a common carrier excuses failure to deliver according to contract. (*Landa v. Holck*, 459.)

ATTORNEYS' FEES.

See *Negotiable Instruments*, 8.

BAILMENT.

1. **BAILMENT—RIGHT OF OWNER TO GOODS.**—The owner of personal property in the hands of a common carrier or other bailee may enforce his right thereto, although a stranger to the bailment. (*Shellenberg v. Fremont etc. R. R. Co.*, 561.)

2. **BAILMENT.—A BAILEE MAY EXCUSE** nondelivery to the bailor, of the property constituting the bailment, by proof that he has delivered it to the rightful owner. (*Shellenberg v. Fremont etc. R. R. Co.*, 561.)

3. **REFUSAL TO SURRENDER GOODS—BURDEN OF PROOF.** In an action against a common carrier, or other bailee, to recover for refusal to surrender the property in its possession to a person other than the bailor, claiming to be the owner, the burden of proof is upon such claimant to establish his right to the property. (*Shellenberg v. Fremont etc. R. R. Co.*, 561.)

See Interpleader; Larceny, 3.

BALLOTS.

See Elections.

BANKS.

CORPORATIONS—NOTICE.—AN OFFICER OF A BANK, dealing with it in his individual interest and capacity, does not charge it with notice of facts within his knowledge, and not communicated to the other bank officers. (*State Bank v. Mathews*, 565.)

See Checks; Corporations, 11; Guaranty, 1, 2.

BASTARDS.

See Parent and Child, 1-3.

BILLS OF LADING.

1. **BILLS OF LADING—INDORSEMENT.**—Bills of lading are symbols of property, and, when properly indorsed, operate as a delivery of the property itself, investing the indorsee with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property under and in pursuance of the bill of lading and to the parties entitled to receive it. (*Union Pac. Ry. Co. v. Johnson*, 540.)

2. **BILL OF LADING** given for grain, "marked and consigned as noted below, to be transported to — and delivered at the railway depot, on payment of freight charges, together with such charges as have been advanced on the same, Consignee, Brown Bros., Grain Company. Destination, Milwaukee, Wis.," and containing the following notations, "Care Union Elevator, Council Bluffs, Iowa. Stop at Brown Bros. Elevator Company to clean. Transfer at Council Bluffs," is a through bill of lading, and does not authorize a delivery of the grain to a consignee at an intermediate point, without presentation of the bill of lading. (*Union Pac. Ry. Co. v. Johnson*, 540.)

See Carriers, 9, 10.

BILL OF PARTICULARS.

BILL OF PARTICULARS.—If the items of any account in respect to amounts, dates, and what accrued are particularized in the body of the complaint, no other bill of particulars need be filed. (*McCoy v. Oldham*, 203.)

BONA FIDE PURCHASERS.

See Negotiable Instruments, 2; Public Lands, 4; Usury; Vendor and Purchaser, 2-8.

BONDS.

See Interest; Municipal Corporations, 3, 5; Officers, 4-7; Suretyship.

BOUNDARIES.

See Waters, 2.

BROKERS.

1. **BROKERS. — NO DISTINCTION EXISTS BETWEEN AGENTS TO SELL REAL ESTATE** and agents to find purchasers therefor. (McFarland v. Lillard, 234.)

2. **BROKERS—COMMISSION, WHEN DUE.**—When a broker to sell land has found a purchaser ready and willing to buy upon the terms proposed by the owner, he has performed his part of the contract, and his commission is due, although, through the fault of the owner, the sale is not consummated. (McFarland v. Lillard, 234.)

3. **BROKERS—COMMISSIONS—STATUTE OF FRAUDS.**—If a real estate broker procures a purchaser, the owner cannot, after repudiating the contract of sale, defeat an action for the broker's commission, on the ground that such contract is void as within the statute of frauds because not in writing, unless it is agreed between the broker and the owner that such contract of sale shall be in writing. (McFarland v. Lillard, 234.)

4. **BROKERS—COMMISSION—CHANGE IN TERMS OF SALE.** Although the terms of sale made by a real estate broker differ from the original terms agreed upon by himself and the owner, he may recover his commission, if the terms upon which he sells are accepted by the owner. (McFarland v. Lillard, 234.)

5. **BROKERS — COMMISSIONS — FINANCIAL ABILITY OF PURCHASER.**—If a broker to sell real estate procures a purchaser, the owner cannot, after repudiating the sale on some other ground than the purchaser's financial inability to complete the purchase, defeat an action for the broker's commission on the last-mentioned ground, unless that ground is made an element of the contract between the broker and the owner. (McFarland v. Lillard, 234.)

BURDEN OF PROOF.

See Bailment, 3; Carriers, 11; Insurance, 26.

CANALS.

See Irrigation.

CANCELLATION.

See Equity, 1; Public Lands.

CARRIERS.

1. **A CARRIER'S DUTY INCLUDES THE FURNISHING OF A GOOD AND SUFFICIENT VEHICLE** in which to transport articles which it undertakes to carry. (Chicago etc. R. R. Co. v. Davis, 148.)

2. **A CARRIER FURNISHING A DEFECTIVE REFRIGERATOR CAR** whereby property shipped therein becomes heated and

spoilt, is answerable to the shipper for the resulting damages. (Chicago etc. R. R. Co. v. Davis, 143.)

3. A CARRIER IS NOT RELIEVED FROM LIABILITY FOR DAMAGES RESULTING FROM FURNISHING A DEFECTIVE REFRIGERATOR CAR, by the fact that the person of whom the shipper purchased the goods shipped had undertaken the duty of inspecting such car and had been negligent. In performing such duty, he was the agent of the carrier, and not of the shipper. (Chicago etc. R. R. Co. v. Davis, 143.)

4. CARRIERS—FAILURE TO FURNISH TRANSPORTATION.—TENDER OF PAYMENT OF FREIGHT CHARGES, when goods are offered for shipment and cars demanded, is not a condition precedent to recovery from a carrier for refusal to furnish cars and for increased freight demanded after such offer, if the carrier requires payment only before delivery to the consignee. (Chicago etc. R. R. Co. v. Wolcott, 320.)

5. CARRIERS—FAILURE TO FURNISH TRANSPORTATION—EVIDENCE.—In an action by a shipper against a carrier, to recover for discrimination in failing to furnish him with cars when demanded, evidence as to the fluctuation of the markets, as well as statements made by the officers and agents of the carrier at the place of shipment relative to furnishing cars, is admissible in favor of the shipper. (Chicago etc. R. R. Co. v. Wolcott, 320.)

6. CARRIERS—FAILURE TO FURNISH TRANSPORTATION.—A carrier is liable for loss to a shipper, sustained by reason of its failure to furnish him with means of transportation, when he has no other means of placing his goods upon the market until after prices have fallen, and he has sustained a loss. (Chicago etc. R. R. Co. v. Wolcott, 320.)

7. CARRIERS—FAILURE TO FURNISH TRANSPORTATION.—A carrier is liable for loss sustained by a shipper, by reason of its failure to furnish him with means of transportation for his produce to points beyond its own line, when he has no other means of shipment, and the carrier holds itself out as furnishing, and does furnish, for others, transportation to such points. (Chicago etc. R. R. Co. v. Wolcott, 320.)

8. CARRIERS—FAILURE AND INABILITY TO FURNISH TRANSPORTATION.—The inability of a common carrier to furnish cars at the times and in the numbers required by a shipper, is matter of defense, which must be pleaded and proved in an action by the shipper to recover for failure to furnish such transportation. (Chicago etc. R. R. Co. v. Wolcott, 320.)

9. LIMITING LIABILITY BY CONTRACT.—A stipulation in a bill of lading that the carrier shall not be answerable for decay of perishable articles, or injury by heat or frost, does not relieve it from liability for its own negligence in furnishing a defective refrigerator car. (Chicago etc. R. R. Co. v. Davis, 143.)

10. A BILL OF LADING ASSUMING TO EXEMPT A CARRIER from liability does not accomplish that purpose, unless the shipper accepted the bill of lading understanding and assenting to the restrictions contained therein, and whether he did so is a question of fact. (Chicago etc. R. R. Co. v. Davis, 143.)

11. CARRIERS.—The burden of proving facts which terminate a carrier's liability as such, must be assumed by it. (Kirk v. Chicago etc. Ry. Co., 397.)

12. DELIVERY OF GOODS BY A COMMON CARRIER to the consignee is made at the peril of the carrier, unless, when made, the consignee surrenders the bill of lading either made or indorsed to himself. (Union Pac. Ry. Co. v. Johnston, 540.)

13. MISDELIVERY—CONVERSION.—A carrier delivering to the consignee at an intermediate point, grain for which it has given a through bill of lading, without the surrender of such bill, is guilty of misdelivery and conversion, for which it is liable to an indorsee for value of the bill of lading. (*Union Package Co. v. Johnson*, 540.)

14. CARRIERS.—THE REFUSAL OF A COMMON CARRIER to surrender goods in its possession to the rightful owner constitutes a conversion, for which he may recover, if entitled to possession at the time of his demand. (*Shellenberg v. Fremont etc. R. R. Co.*, 561.)

15. CARRIERS.—PAYMENT OF FREIGHT CHARGES required by the carrier before delivery, upon the alternative of nonshipment, is not a voluntary payment. (*Chicago etc. R. R. Co. v. Wolcott*, 320.)

16. CARRIERS — FREIGHT CHARGES — RECOVERY. — Overcharges made, in violation of a statute prohibiting an increase in freight rates over the rate charged at the time freight is tendered to a railroad, may be recovered back when paid. (*Chicago etc. R. R. Co. v. Wolcott*, 320.)

17. CARRIERS—GARNISHMENT—ESTOPPEL.—A common carrier having adopted a certain place as a station on its line, and entered into a contract of carriage therefrom, is estopped to deny, in garnishment proceedings, that property delivered in its yard at such place, and awaiting shipment by it, is in its possession. (*Landa v. Holck*, 459.)

18. COMMON CARRIERS MAY SO HOLD THEMSELVES out to the public as to become liable for not receiving and carrying goods beyond their own lines. (*Chicago etc. R. R. Co. v. Wolcott*, 320.)

19. A CARRIER OF LIVESTOCK, WHO PERMITS THE PEN in which it must be placed for loading, to have in it salt water accessible to such stock, and from the drinking of it they will probably sicken and die, is answerable for the damages suffered on that account by a shipper. (*Norfolk etc. R. R. Co. v. Harman*, 855.)

See Attachment, 4, 5; Bailment, 3; Interpleader; Interstate Commerce, 5; Railroads, 13-24; Telegraph Companies, 1.

CEMETERIES.

See Nuisance, 1.

CERTIFICATES.

See Public Lands, 1, 2.

CHARACTER.

See False Imprisonment, 1.

CHATTEL MORTGAGES.

See Assignment for the Benefit of Creditors, 2; Execution, 8-12.

CHECKS.

1. BANKS AND BANKING.—A check is within the provisions of the statute providing that, in actions upon promissory notes or bills of exchange by an indorsee, possession of the note or bill is prima facie evidence that it was indorsed by the person by whom it appears to be endorsed. (*Estes v. Lovering Shoe Co.*, 424.)

2. BANKS AND BANKING.—A CHECK IN THE POSSESSION OF A PARTY in a city distant from the bank upon which it is drawn, five or six days after its date, is not stale and overdue, so as to subject

an indorsee in good faith and for value to an equitable defense existing in favor of the drawer. (*Estes v. Lovering Shoe Co.*, 424.)

3. BANKING.—A CHECK DRAWN FOR VALUE BY A DEPOSITOR in a bank operates, pro tanto, in Illinois as an assignment of the funds of such depositor in such bank, but the law is otherwise in New York. (*Abt v. American etc. Bank*, 175.)

4. CONFLICT OF LAWS—BANKING.—A CHECK DRAWN IN ILLINOIS on a New York bank, and payable there, is controlled by the laws of the latter state, and therefore does not take effect as an assignment, pro tanto, of the funds of the drawer in a New York bank, though it would have effected such an assignment under the laws of Illinois had the check been drawn upon a bank doing business therein. Nor are the rights of the drawee increased by the fact that the bank in New York has paid the funds which were therein, to an assignee for the benefit of creditors under an assignment made in the state of Illinois. (*Abt v. American etc. Bank*, 175.)

CIRCUMSTANTIAL EVIDENCE.

See Homicide, 2.

CLAIMS.

See Executors and Administrators; Statutes, 7.

CLOUD ON TITLE.

1. A CLOUD UPON THE TITLE is a semblance of title, either legal or equitable, or a claim of a right in lands, appearing in some legal form, but which is, in fact, invalid, or which it would be inequitable to enforce. (*Shults v. Shults*, 188.)

2. A BILL IN EQUITY CLAIMING TITLE TO LANDS, dismissed without a hearing upon the merits, may constitute a cloud upon the title to such lands, on account of which the owner is entitled to maintain a subsequent suit in equity to remove such cloud. (*Shults v. Shults*, 188.)

COLLATERAL ATTACK.

See Actions, 2; Appeal, 8; Jurisdiction; Taxes, 1.

COLLATERAL SECURITY.

See Corporations, 4.

COMMISSIONERS.

See Insurance, 13; Public Lands, 11.

COMMISSIONS.

See Brokers, 2-5.

COMPROMISE.

COMPROMISE, WHEN WILL NOT BE ENFORCED.—An agreement by the owner of personal property wrongfully withheld from him by another, on the latter's surrendering possession thereof, that it shall be returned to him, if his vendor, on a trial for stealing it, shall not be convicted, cannot be supported as a compromise, and is therefore void. (*Fink v. Smith*, 750.)

CONDITIONS.

See Insurance, 1-3.

CONFLICT OF LAWS.

See Checks, 3, 4; Corporations, 20.

CONSIDERATION.

See Contracts, 1; Settlements, 2.

CONSTITUTIONS.

1. LAW OF THE LAND AND DUE PROCESS OF LAW are legal equivalents, but everything which may pass under the form of statutory enactment need not necessarily be considered the law of the land. (State v. Julow, 443.)

2. CONSTITUTIONAL RIGHTS CANNOT BE ABRIDGED by legislation under the guise of police regulation. (State v. Julow, 443.)

3. CONSTITUTIONAL LAW—ENJOYMENT OF LIFE, LIBERTY, AND PROPERTY.—A constitutional guaranty of the enjoyment of life, liberty, and property carries with it all that effectuates and renders complete the unrestrained enjoyment of that guaranty. (State v. Julow, 443.)

4. CONSTITUTIONAL LAW—ENJOYMENT OF PROPERTY.—A constitutional guaranty of the enjoyment of the right of property includes the right to acquire property by labor or contract, and of terminating a contract at pleasure, being civilly liable for any unwarranted termination. (State v. Julow, 443.)

5. CONSTITUTIONAL LAW.—DEPRIVING AN OWNER OF PROPERTY of one of its essential attributes is depriving him of his property, within the meaning of a constitutional guaranty, that no person shall be deprived of life, liberty, or property without due process of law. (State v. Julow, 443.)

See Legislature; Statutes, 1, 2, 6-12.

CONTEMPT.

1. CONTEMPT BY NEWSPAPER PUBLICATION.—Any publication relating to a cause pending in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice, or reflecting on the tribunal or its proceedings, or on the parties, jurors, witnesses, or counsel, may be punished as a contempt. (Percival v. State, 568.)

2. CONTEMPT.—NEWSPAPER PUBLICATION is a contempt of court only when it has reference to a matter then pending in court, and is of a character tending to the injury of pending and subsequent proceedings upon such matter. (Percival v. State, 568.)

3. CONTEMPT BY NEWSPAPER PUBLICATION—CONCLUSIVENESS OF ANSWER.—If a newspaper publication alleged to be a contempt of court is indefinite in its meaning and application, and not libelous per se, and only becomes so and made to apply to the court by the use of innuendoes, and is fairly susceptible of an innocent meaning, so far as any reflection upon the court is concerned, and defendant answers under oath that he used it in a sense not libelous, and declares that he intended no imputation upon the court, either impugning the motives or integrity of the judge, or to embarrass the administration of justice, his answer must be taken as conclusive. (Percival v. State, 568.)

CONTRACTS.

1. CONSIDERATION, WANT OF.—A contract made by the owner to obtain possession of his goods, when they are unlawfully withheld from him, is without consideration and void. (Fink v. Smith, 750.)

2. CONTRACTS.—IF TWO CONTRACTS ARE CONTEMPORANEOUSLY EXECUTED by the same parties, and relate to the same subject matter, they must be construed together as constituting but one agreement. (*Bradtfeldt v. Cooke*, 701.)

3. PUBLIC POLICY.—If a contract when made conforms to the public policy of the state, a change in public policy cannot avoid it. (*Stephens v. Southern Pac. R. R. Co.*, 17.)

4. CONTRACTS—ENFORCEMENT OF WHEN ILLEGAL.—A court will not, in an action between the parties to an illegal contract, lend its aid, either to annul it when executed, or to enforce it when executory. (*Bradtfeldt v. Cooke*, 701.)

5. FALSE REPRESENTATION OF A MATERIAL FACT, constituting the inducement of a contract, on which the purchaser has a right to rely, is always a ground for rescission in a court of equity. (*Wilson v. Carpenter*, 824.)

See Evidence, 10; Mistake; Officers, 1, 2; Sales; Statutes, 5.

CONVERSION.

See Carriers, 13, 14.

CORPORATIONS.

1. ORGANIZATION—AGENCY.—Stock subscribers present at the organization of a corporation are agents for absent subscribers only for the formation of such a corporation as has been agreed upon by all of the subscribers. If those present go beyond the bounds set, and form a corporation with additional and distinct purposes, they exceed their authority, and their acts, as to absent and nonconsenting subscribers, are void. (*Marysville Electric Light etc. Co. v. Johnson*, 34.)

2. CORPORATIONS.—THE CUSTOM of a corporation to issue a certificate of stock to replace one which has been lost only upon execution of a bond of indemnity, is not binding upon its stockholders, nor does it deprive them of any remedy which they may otherwise have to compel the issuing of such certificate without the giving of indemnity. (*Gullford v. Western Union Tel. Co.*, 407.)

3. CORPORATIONS, LOST CERTIFICATE—INDEMNITY.—Before issuing a new certificate of stock in place of one alleged to have been lost, indemnity cannot be exacted by the corporation, where a statute of the state provides that if the evidence is clear that such certificate has been lost or destroyed, and that it has not been heard of for the period of seven years, it shall be the duty of the corporation to issue a new certificate without indemnity, and it appears that the original certificate disappeared twelve years prior to the trial, during all of which time regular dividends had been declared on the stock, and no claimant to either the stock or the certificate had appeared, other than the person to whom it issued and his heirs at law. Independently of the statute, the right to a new certificate should, under the circumstances, be affirmed, though the applicant is unable to give any indemnity. (*Gullford v. Western Union Tel. Co.*, 407.)

4. ONE HOLDING STOCK AS COLLATERAL SECURITY only is entitled to the same remedy by suit to obtain relief against the misappropriation of funds and property of the corporation as any other stockholder. (*Green v. Hedenberg*, 178.)

5. CORPORATIONS—STOCKHOLDER'S SUIT.—If the officers of a corporation wrongfully deal with its property, to the injury

of the stockholders, they may maintain a bill against the corporation and its officers for relief against such misappropriation. Before bringing their bill, they should make demand on the proper officers of the corporation to bring it, but if it is reasonably certain that such demand would be unavailing, it need not be made. (*Green v. Hedenberg*, 178.)

6. CORPORATIONS — LIABILITY ON STOCK SUBSCRIPTIONS—CONDITIONS PRECEDENT.—A contract to subscribe for shares in a corporation to be thereafter formed does not become binding or create a liability until all conditions precedent upon which the contract is made have been performed, and no liability is incurred, unless the corporation which is organized is the specific corporation contemplated at the time of the agreement. (*Marysville Electric Light etc. Co. v. Johnson*, 84.)

7. LIABILITY ON STOCK SUBSCRIPTION — ADDITIONAL PURPOSE OF CORPORATION.—A subscriber, who contracts to take stock in a corporation to be formed for a certain and specified purpose, cannot, without his consent, be compelled to pay money toward the formation of a corporation for an additional and distinct purpose. (*Marysville Electric Light etc. Co. v. Johnson*, 84.)

8. CORPORATIONS, POWERS OF.—A SUBSCRIPTION of a sum of money by a corporation, to be paid on the location of a post-office on a lot adjoining that on which its business was conducted, is not ultra vires, where it is engaged in manufacturing and dealing in certain articles of merchandise, and the location of the postoffice might reasonably be expected to promote its business and enhance its profits. (*B. S. Green Co. v. Blodgett*, 146.)

9. A CORPORATE SEAL IS NOT ESSENTIAL to the validity of a written contract entered into by a corporation. (*B. S. Green Co. v. Blodgett*, 146.)

10. CORPORATIONS—NOTICE TO OFFICER AS NOTICE TO CORPORATION.—Knowledge which comes to an officer of a corporation through his private transactions, and beyond the range of his official duties, is not notice to the corporation, although he is, at the time, the managing agent of the corporation. (*Kearney Bank v. Froman*, 456.)

11. CORPORATIONS — DECLARATIONS OF OFFICER — EVIDENCE.—In an action by a bank on a note against two parties, as partners, a declaration made to a third person by an officer of the bank having no connection with its active management, that he does not regard the defendants as partners, is incompetent as evidence to show that the knowledge of such officer is notice to the bank that the defendants are not partners. The admission of such evidence is prejudicial and reversible error. (*Kearney Bank v. Froman*, 456.)

12. CORPORATIONS—LIABILITY FOR WILLFUL ACT OF AGENT.—A corporation is responsible for the acts of its agent performed while engaged in the discharge of duties within the general scope of his agency, although the particular act was willful, and not directly authorized. (*Pittsburgh etc. R. R. Co. v. Sullivan*, 313.)

13. LIABILITY FOR AGENT'S WRONGFUL ACT.—A corporation intrusting a general duty to an agent is liable to an injured person for damages flowing from the agent's wrongful act, done in the course of his general authority, although, in doing the particular act, the agent may have failed in his duty to his principal, and disobeyed his instructions. (*Pittsburgh etc. R. R. Co. v. Sullivan*, 313.)

14. THE PRESIDENT OF A CORPORATION owning and publishing a newspaper is a proper person to certify, under oath, to

the publication of a notice therein. It is not necessary to affix the seal of the corporation to such verified certificate. (*Hertig v. People*, 162.)

15. CORPORATIONS—POWERS OF PRESIDENT.—The president of a corporation, by virtue of his office merely, has very little authority to act for the corporation. His powers depend upon the nature of the corporate business and the authority given him by the board of directors. They may invest him with authority to act as the chief executive officer of the corporation. This may be done by resolution, or by acquiescence in a course of transacting the corporate business. (*National State Bank v. Vigo County Nat. Bank*, 330.)

16. CORPORATIONS.—ONE DEALING WITH THE PRESIDENT of a corporation, in the usual course of business, and within the powers which he has been accustomed to exercise without objection from the directors, has the right to assume that he has been invested with those powers. (*National State Bank v. Vigo County Nat. Bank*, 330.)

17. CORPORATIONS—CONTRACT MADE BY PRESIDENT.—If a contract is made in the name of a corporation by its president, in the usual course of business, which the directors have the power to authorize him to make, or to ratify after it is made, the presumption is that the contract is binding on the corporation. (*National State Bank v. Vigo County Nat. Bank*, 330.)

18. CORPORATIONS—FOREIGN, JURISDICTION OVER.—If a foreign corporation is allowed to do business and maintain suits in this state, justice requires that we should here enforce its liabilities existing in favor of our citizens. (*Gulford v. Western Union Tel. Co.*, 407.)

19. CORPORATIONS, FOREIGN, COMPELLING ISSUING OF STOCK BY.—The courts of this state have jurisdiction to compel a foreign corporation doing business therein to issue a certificate of stock to a citizen of this state in lieu of a pre-existing certificate which has been lost. (*Gulford v. Western Union Tel. Co.*, 407.)

20. CORPORATIONS, FOREIGN, CONFLICT OF LAWS.—The general law of the state in which a corporation was formed, not constituting part of its charter, but providing a method of obtaining new stock certificates in place of originals which have been lost, is not binding upon a citizen of another state, nor can it exclude him from any of the remedies available in that state to compel the issuing to him by such corporation of a certificate of stock to replace the one which has been lost. (*Gulford v. Western Union Tel. Co.*, 407.)

See Estoppel; Real Property, 1; Receivers, 2.

CORPUS DELICTI.

See Homicide.

COSTS.

RECEIVERS—FEES OF—TAXATION OF AS COSTS.—It is reversible error for the court, without examination of a receiver's account, to direct that all such receiver's expenses and compensation shall be taxed as costs by the clerk of the court against the unsuccessful party to the suit, and the amount thereof entered in the judgment. (*Cutter v. Pollock*, 644.)

COTENANCY.

1. COTENANCY—ACTION FOR RENT.—If tenants in common have executed a joint demise, they must join in actions based upon

the lease, unless it provides for a separate rendering of rent to each, or a separate covenant for the payment of rent to each; but if they have not so bound themselves, and are claiming rents under a lease made by the ancestor, their rights accord with their interests, the accruing rent is apportioned among them, and the tenant can be compelled to pay to each his proportionate share. (*Bowser v. Cox*, 274.)

2. COTENANCY—IRRIGATING DITCH—REPAIRS.—If tenants in common of an irrigating ditch neglect to keep it in repair, one of them has no right to stop up the ditch, though it causes an overflow on his land. All are equally bound to repair, and the injured cotenant may protect himself by completing the necessary repairs and holding his cotenants liable for their share of the expense. (*Moss v. Rose*, 743.)

See Ejectment, 2, 3.

COURTS.

PRACTICE—VOID ORDERS.—AN EX PARTE order of court, procured by the clerk thereof, forbidding a guardian from issuing execution on a judgment procured by him as guardian, is void. (*Curran v. Abbott*, 837.)

COVENANTS.

1. A COVENANT MAY BE ENFORCED IN EQUITY, WHETHER IT RUNS WITH THE LAND OR NOT, where it appears that it was the intention of the parties that it should bind their successors in interest, as well as themselves. (*Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co.*, 807.)

2. COVENANTS, SUCCESSIONS IN INTEREST, WHEN BOUND BY.—If a covenant, or agreement, has been made between two parties respecting their property, and the interest of one of them is afterward subjected to a judicial sale under a lien antedating such covenant, and the purchaser, after his purchase, recognizes and acts upon the agreement for a time, thus receiving benefit therefrom, this is an affirmation of the covenant, and though it relates to land, and the affirmation is by parol, it becomes binding upon such purchaser, and equity will require him to perform it. (*Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co.*, 807.)

See Landlord and Tenant.

CRIMINAL LAW.

See Arrest; Homicide; Larceny; Statutes, 9, 11; Trial, 6.

CROSSINGS.

See Railroads, 4-9.

DAMAGES.

JURY TRIAL.—DAMAGES AWARDED LESS IN AMOUNT than the damages testified to, raise no presumption that the jury was influenced by passion or prejudice in making the award. (*Beatrice v. Leary*, 546.)

See Highways, 3-5; Husband and Wife, 7, 8; Insane Persons; Landlord and Tenant, 4; Municipal Corporations, 8-10; Sales, 7.

DAMS.

See Negligence, 2.

DEATH.

See Negotiable Instruments, 5.

DEBTOR AND CREDITOR.

See Assignment for the Benefit of Creditors, 8; Fraudulent Conveyances.

DECLARATIONS.

See Corporations, 11.

DEEDS.

1. CONVEYANCE — REPUGNANCY.—IF THE TERMS USED IN A DEED VEST THE FEE IN THE FIRST TAKER, other parts of the instrument showing an intention to give a less estate must be disregarded. Therefore, if a deed purports to convey real property to two grantees, but contains a clause declaring that, in case either grantee dies without heirs, her interest shall vest in the survivor, such clause is not wholly inoperative. (*Palmer v. Cook*, 165.)

2. DEEDS, DELIVERY OF, WHAT IS.—If a grantor, by his acts of delivery, loses all control over an instrument by which a grantee is to become possessed of an estate, then there is a sufficient delivery. The question is to be determined largely by the intention of the grantor, which may be ascertained by his acts and declarations, and by the circumstances attending the execution of the deed and its delivery to a third party. (*Shults v. Shults*, 188.)

3. DELIVERY.—IF THE GRANTOR LEAVES HIS DEED IN THE POSSESSION OF A THIRD PERSON, and there is no testimony as to the directions given to him, and the deed is afterward taken away by the grantor and destroyed, and he at all times retained possession of the premises, selling part and exercising rights of ownership over the whole, a final and operative delivery of the deed will not be presumed. (*Shults v. Shults*, 188.)

See Estates, 1; Mortgages, 1; Sheriffs, 1, 8.

DEFAULT.

See Judgments, 8-11.

DEFINITIONS.

Affidavit. (*Hertig v. People*, 162.)

Cloud on title. (*Shults v. Shults*, 188.)

Employés. (*Johnston v. Barrills*, 717.)

LABORERS are those who perform with their own hands the contract they make with their employers, and not those who are mere contractors to have work done, and whose compensation is the profit realized on the transaction. (*Johnston v. Barrilla*, 717.)

"Month." (*McGinn v. State*, 617.)

"More necessary public use." *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.

"Necessary." (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

AN OATH INCLUDES EVERY FORM OF ATTESTATION by which the party signifies that he is bound in conscience to perform an act faithfully and truthfully. (*State v. Gay*, 889.)

Penalty. (*Krutz v. Robbins*, 871.)

"Presumption." (*Ward v. Metropolitan etc. Ins. Co.*, 80.)

"Responsible." (*State v. Richards*, 415.)

WAIVER—PRESUMPTION.—A waiver is an intentional relinquishment of a known right. A presumption of the relinquishment of a known right cannot be rested on a presumption that such right was known. (*Ward v. Metropolitan etc. Ins. Co.*, 80.)

DELIVERY.

See Carriers, 12-19; Deeds, 2, 3; Mortgages, 2; Negotiable Instruments, 4; Settlements, 3.

DELUSIONS.

See Wills, 3.

DESCENT.

HEIRSHIP, FORFEITURE.—THE MURDER OF A FATHER BY HIS SON does not justify the court in disregarding the statutes of descents and distributions, by which the son inherits as heir of the father. (*Carpenter's Estate*, 765.)

DETINUE.

See Replevin, 3.

DISCHARGE.

See Mortgages, 7, 8.

DISTRIBUTION.

See Descent.

DITCHES.

See Irrigation.

DIVORCE.

See Marriage and Divorce.

DRAINAGE.

See Municipal Corporations, 11.

EASEMENTS.

1. EASEMENTS—PRESCRIPTION.—To establish an easement, by prescription, of the right to have a building supported upon the land of another, it is absolutely essential that the user be adverse, and such as to give a right of action in favor of the party against whom it has been exercised. (*Whiting v. Gaylord*, 87.)

2. EASEMENTS OR GRANTS NOT IMPLIED, WHEN.—Implied grants of land, or of easements, or of any interest in land, are allowed in Connecticut, to a very much more limited degree than in the other states. (*Whiting v. Gaylord*, 87.)

3. EASEMENT, CONVEYANCE OF.—An easement, not expressly mentioned in a deed, does not pass, unless it naturally and necessarily belongs to the premises. (*Whiting v. Gaylord*, 87.)

4. EASEMENT OF SUPPORT DEPENDS UPON WHAT.—The existence of an alleged easement, claimed to be annexed to one's land, to use the land of another for a special purpose, as to have a building supported thereon, depends, generally, on the question

whether it is open, visible, continuous, and necessary. (*Whiting v. Gaylord*, 87.)

5. EASEMENT OF SUPPORT ON ANOTHER'S LAND—PURCHASER IS NOT OBLIGED TO INSPECT PREMISES.—No easement of the right to have one's building supported upon the land of another, can be implied, unless there is an open and visible necessity therefor, essential to the enjoyment of the estate granted. Hence the purchaser, taking a deed without express mention of such easement, is under no obligation to make examination and inquiry to ascertain whether it exists. (*Whiting v. Gaylord*, 87.)

See Highways, 1, 2.

EJECTMENT.

1. EJECTMENT.—PLAINTIFF IN EJECTMENT MUST RECOVER upon the strength of his own title, and not upon the weakness of his adversary's. (*Cox v. Arnold*, 450.)

2. A COTENANT SUING IN EJECTMENT cannot recover possession of the whole property, though such possession is held by a stranger to the title. The plaintiff's recovery must be limited to the interest which he proves. (*Marshall v. Palmer*, 838.)

3. COTENANT SUING IN EJECTMENT MUST PROVE the extent of his interest, or suffer judgment to be given for the defendant. (*Marshall v. Palmer*, 838.)

ELECTIONS.

1. AN ELECTION LAW SHOULD NOT BE CONSTRUED so radically as to render it incapable of enforcement without disfranchising great numbers of electors through no fault of theirs. (*State v. Gay*, 389.)

2. ELECTION LAWS, WHEN DIRECTORY.—A provision in a statute, that two judges of election, of opposite political parties, shall place their initials on the backs of all ballots before they are used by the voters, is not mandatory, and a failure to observe this provision, and the consequent marking of the ballots by judges who are of the same party, does not require the rejection of such ballots, when cast in good faith. (*State v. Gay*, 389.)

3. ELECTION LAWS—MANDATORY PROVISIONS.—That part of the statute requiring the administration of an oath to such voters as claim the right to have their ballots marked by another, is mandatory. (*State v. Gay*, 389.)

4. ELECTION OATH, FORM OF, FOR ILLITERATE VOTERS. If, after a voter has explained that he cannot read English, or cannot see because he has left his spectacles at home, he is sworn, and thereafter the judge says to him, "You swear now to this, that what you have told me is true," this is a sufficient making oath by the voter as reasons why he cannot mark his ballot for himself, and must have the aid of a judge of election or some other qualified elector. (*State v. Gay*, 389.)

5. ELECTION LAWS—RIGHT TO HAVE BALLOTS MARKED. The fact that an elector left his spectacles at home, and could not see without them, does not entitle him to have his ballot marked for him by a third person. (*State v. Gay*, 389.)

6. ELECTIONS.—THAT THE MARKING OF A BALLOT FOR AN ILLITERATE PERSON was done at a table at which the judges and clerks sat, and in the presence of other electors, who were pas-

sing in and out of the booth, and who might have heard how the voter intended to vote, does not warrant the exclusion of the ballots marked under such circumstances, where there was no design to destroy the secrecy of the ballot. (State v. Gay, 389.)

7. ELECTION LAWS.—THE FACT THAT THE SAME PERSON HAS MARKED THE BALLOTS of more than three voters does not require the rejection of such ballots, if it does not appear that any of the voters knew that the ballot cast by him had been marked by a person who had marked three other ballots, nor that anyone intended any fraud. Nor will the court infer such knowledge on the part of the voters, because the room was small, and the location of the table on which the marking was done was such that some of the voters must have known what was being done. (State v. Gay, 389.)

8. ELECTIONS.—THE FACT THAT A STAMP REQUIRED TO BE UPON BALLOTS BEFORE THEY WERE DELIVERED to the electors was not put thereon until afterward, provided they were stamped before being put in the ballot-box, is an irregularity merely, not requiring the exclusion of such ballots from the count. (Moyer v. Van De Vanter, 900.)

9. DISFRANCHISING ELECTORS FOR FAILURE OF ELECTION OFFICERS.—A statute providing that on each official ballot the inspector or one of the judges shall write his initials, and that any ballot not indorsed with such initials shall not be counted, is unconstitutional, where the constitution declares that all male persons possessing certain qualifications shall be entitled to vote at all elections. The legislature cannot practically disfranchise the electors of a precinct who were themselves without fault. (Moyer v. Van De Vanter, 900.)

10. THE FAILURE OF ELECTION OFFICERS TO HAVE BOOTHS ERECTED in the manner prescribed by law is an irregularity which does not vitiate the election. (Moyer v. Van De Vanter, 900.)

ELECTRIC LIGHT COMPANIES.

See Municipal Corporations, 6 7.

EMBEZZLEMENT.

See Larceny.

EMINENT DOMAIN.

1. EMINENT DOMAIN—CONSTITUTIONAL LAW.—To the legislature, and not to the courts, has been committed the power to determine when the exigencies of the public demand the taking of private property for public use, the limit of judicial interference being the duty to declare void acts clearly violative of the fundamental law of the state. (Faxon etc. Land Co. v. Farmers' etc. Land Co., 585.)

2. EMINENT DOMAIN—PUBLIC USE.—If, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material, in applying the doctrine of eminent domain. (Butte etc. Ry. Co. v. Montana etc. Ry. Co., 508.)

3. WHAT IS A "MORE NECESSARY PUBLIC USE."—Under a statute providing, that before property already appropriated to some public use may be again taken, it must appear that the public use to which it is to be applied is a "more necessary public use," it is not necessary that the new public use should, in all cases, be a "different" public use. Hence, if a railroad traversing the side of a mountain in a mining section has within its right of way tracts of ground not necessary to the proper, successful, and safe operation of its system of tracks and

spurs, and not used by it in connection with any such operations, and in all reasonable probability not necessary for any such future use, and another road, in seeking the same objective points, is obliged to take part of such unused right of way to avoid a considerably more circuitous route, at a different grade, of very much greater cost, and of serious damage to many mining properties, and would, in any event, be obliged to parallel the adversary road a part of the way, the use, under such conditions, of the unused parts of the right of way of the one company by the other is a "more necessary public use" than that to which such unused portions are already appropriated. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

4. EMINENT DOMAIN.—THE WORD "NECESSARY," as used in a statute permitting lands appropriated for a public use by a railroad company to be again taken for a "more necessary public use," does not mean an absolute necessity for the particular location sought, but a reasonable necessity, founded upon the practicability, economy, facilities, and other considerations which should govern the determination of what the necessities may be, always considering the rights of the senior company, yet never forgetting the benefits to the public. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

5. EMINENT DOMAIN—CORPORATIONS—ACTUAL USE.—One corporation cannot take the lands or franchises of another in actual use by it, unless authorized to do so by the legislature; but its lands not in actual use may be taken by another corporation, authorized to take lands for its use in invitum, whenever the lands of an individual may be taken, and there is a necessity therefor; and opposing corporations may be limited to the enjoyment of that property in actual use by them, and that which is reasonably necessary for the safe, proper, and convenient management of their business, and the accomplishment of the purposes of their creation. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

6. EMINENT DOMAIN—PUBLIC USE.—There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the elements of public utility. A public use need not be for the benefit of the whole public: it may be for the benefit of the inhabitants of a small or restricted locality, but the use and benefit must be in common, and not to particular individuals. (*Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 585.)

7. EMINENT DOMAIN—IRRIGATION.—The use of water for irrigation purposes may become a public use, and it does so become under the operation of the "Rayner Irrigation Law" of Nebraska, and companies organized and operating under that law have power to acquire a right of way for necessary canals and reservoirs by condemnation. (*Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 585.)

8. EMINENT DOMAIN—LIMITATION UPON THE RIGHT.—The power to take the property of private citizens or corporations for public use must be exercised, and can be exercised, only so far as the authority extends, either in terms expressed by the law itself, or by implication, clear and satisfactory. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

9. PUBLIC WAY, WHAT IS.—If all the people have the right to use a way, it is a public way, within the law of eminent domain, although the numbers who have occasion to exercise the right is very small. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

10. CHARACTER OF WAY, HOW DETERMINED.—The character of a way, whether it is public or private, is determined, under the law of eminent domain, by the extent of the right to use it, and not by the extent to which that right is exercised. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

See Municipal Corporations, 8; Railroads, 1-9.

EQUITY.

1. EQUITY—POWER TO RESTORE CANCELED MORTGAGE.—If a mortgagee takes a new mortgage in the place of an old one, not as payment, but in continuation of the old indebtedness, and cancels the old mortgage without knowledge of an intervening lien, although such lien is of record, equity will, in the absence of the intervening rights of third parties, and on the ground of mistake, restore and enforce the lien of the old mortgage, where he, relying upon a false abstract of title, was guilty of no negligence in not discovering the lien of record. (Kern v. Hotelling, 710.)

2. EQUITY—MORTGAGE—ENFORCEMENT OF SUPERIOR EQUITY.—If one who expects to acquire title to land places a lien thereon, and, after obtaining his deed, gives a mortgage on the land for a part of the purchase price, the lien of the mortgage is paramount, where the mortgagee has not, through his own fault, surrendered or impaired his superior equity, and no disadvantage has accrued to the other party by reason of the mortgagee canceling his mortgage by mistake, and taking a new one in ignorance of the other party's equity. (Kern v. Hotelling, 710.)

3. EQUITY WILL NOT ENFORCE A PENALTY OR FORFEITURE. (Krutz v. Robbins, 871.)

4. JUDGMENTS—MODIFICATION.—A court of equity may, in furtherance of justice, modify a judgment in a matter relating, not to the merits of the case, but solely to the mode of carrying out the decision of the court. (Tyler v. Shea, 660.)

See Cloud on Title, 2; Contracts, 5; Covenants; Maxims; Notice; Railroads, 10, 11.

ESTATES.

1. AN ESTATE CANNOT BY DEED BE LIMITED OVER TO another after a fee already granted. (Palmer v. Cook, 165.)

2. THE TERM "REMAINDER," NECESSARILY IMPLIES what is left, and, if the entire estate is granted, there can be no remainder. (Palmer v. Cook, 165.)

ESTOPPEL.

EVIDENCE—PRESUMPTION AS TO ACTS OF OFFICERS.—WAS SILENT when other parties stated their purpose to use moneys of the corporation in making payment for corporate stock does not estop him from maintaining suit to prevent or redress such misappropriation. (Green v. Hedenberg, 178.)

EVIDENCE.

1. EVIDENCE OF OTHER MISREPRESENTATIONS made by the agent of the vendor to other persons to induce purchases of property are admissible, in a suit to cancel a sale made by him for his misrepresentation, not as evidence of the statements made by him to the complainant, but as showing the bent of the agent's mind on the subject of these representations. (Wilson v. Carpenter, 824.)

2. EVIDENCE OF OTHER TRANSACTIONS than those in issue in an action, is admissible only for the purpose of proving the scienter, when it is an issue in the cause. (Johnson v. Gulick, 629.)

3. NOTARIES PUBLIC.—COURTS WILL TAKE JUDICIAL NOTICE of the notaries public in the counties in which they are held. (Hertig v. People, 162.)

4. EVIDENCE.—THE TERM "PRESUMPTION" is used to signify that which may be assumed without proof, or taken for granted. (Ward v. Metropolitan etc. Ins. Co., 80.)

5. PRESUMPTIONS.—It is presumed that regular and ordinary means are adopted for a given end. It will therefore be presumed when a claim is made for thrashing grain, that the work was done in the ordinary manner, by a thrashing machine, and not by mere manual labor. (*Johnston v. Barrills*, 717.)

6. PRINCIPAL AND AGENT.—THERE IS NO PRESUMPTION that the duties of a private agency have been faithfully performed. (*Ward v. Metropolitan etc. Ins. Co.*, 80.)

7. PRESUMPTIONS IN FAVOR OF THE LEGALITY OF OFFICIAL ACTS never go to the extent of supplying a jurisdictional fact. (*Hannah v. Chase*, 656.)

8. EVIDENCE—PRESUMPTION AS TO ACTS OF OFFICERS.—A sale under a power contained in a mortgage, when foreclosed by advertisement, is not a judicial sale, when conducted by an officer specially authorized by statute. The presumption that such officer has done his duty does not apply to such a transaction. (*Hannah v. Chase*, 656.)

9. EVIDENCE—PRESUMPTION AS TO RECEIPT OF LETTER.—The presumption is, that a notice by letter given to an insured person, addressed to the place where he resided and usually received his letters, was received in the due course of mail, especially where the notice was subsequently found in the possession of the person to whom it was addressed. (*Pitts v. Hartford etc. Ins. Co.*, 96.)

10. PAROL EVIDENCE IS NO MORE ADMISSIBLE to contradict or vary a contract implied from a written instrument than it is to contradict or vary the express terms of such instrument. (*Bryan v. Duff*, 889.)

11. THE DRAWER OF A DRAFT OR OTHER BILL OF EXCHANGE WILL NOT BE PERMITTED TO PROVE BY PAROL that, at the time it was drawn, the payee agreed that he would not hold the drawer answerable for any default in its payment. (*Bryan v. Duff*, 889.)

12. WILLS—EXTRINSIC EVIDENCE.—For the purpose of determining the object of a testator's bounty in a will, extrinsic evidence is admissible to identify the legatee. (*Chappell v. Missionary Society*, 276.)

13. IDENTIFICATION OF LEGATEE—EXTRINSIC EVIDENCE. Though no person or corporation in existence precisely answers to the name or description of the person or corporation to be benefited by a will, extrinsic evidence is admissible to show who was intended. Hence, such evidence is competent to show that a bequest by a testatrix, a member of the Church of Christ, to the "Christian Missionary Society of a certain state, was intended for the "Missionary Society of the Churches of Christ" of that state. (*Chappell v. Missionary Society*, 276.)

14. JUDGMENT AS EVIDENCE OF LEASE.—In an action to recover rent due, a judgment for the tenant against the landlord for possession of the leased premises, is admissible in evidence to prove the execution of the lease. (*McCoy v. Oldham*, 208.)

See Appeal, 14-16; Trial, 4.

EXCEPTIONS.

See Appeal, 10.

EXECUTIONS.

1. EXEMPTION LAWS MUST BE LIBERALLY CONSTRUED in favor of the debtor. (*Pickrell v. Jerauld*, 192.)

2. EXEMPTIONS—PARTIES—SETOFF.—In an action by an assignee of a note, the assignor is a proper party plaintiff for the

purpose of claiming the proceeds of the note as exempt from a judgment held by the defendant against the assignor, and pleaded as a setoff against the note. (*Pickrell v. Jerauld*, 192.)

3. A NOTE EXEMPT from a judgment upon which execution has issued is not made subject thereto by an assignment of the note before any claim for exemption is made. (*Pickrell v. Jerauld*, 192.)

4. EXEMPTION AGAINST JUDGMENT—EVIDENCE.—If a claim for statutory exemption is set up against a judgment clearly shown by the record to have been rendered in an action founded on contract, evidence is not admissible to show that such judgment was rendered in an action founded on tort, for the purpose of defeating the claim for the exemption. (*Pickrell v. Jerauld*, 192.)

5. EXECUTION.—PREFERENCES IN FAVOR OF LABORERS and employes do not include persons who own and operate threshing machines. (*Johnston v. Barrilla*, 717.)

6. EXECUTION.—A LABORER'S RIGHT TO PREFERENCE is not extinguished nor waived by his taking a negotiable note from his debtor for the amount due for wages. (*Johnston v. Barrilla*, 717.)

7. EXECUTION.—PREFERENCE IN FAVOR OF WAGES does not extend to moneys due for thrashing grain in the ordinary manner by the aid of machinery. (*Johnston v. Barrilla*, 717.)

8. EXECUTION—MORTGAGED PERSONAL PROPERTY—LEVY.—Under a statute authorizing mortgaged personal property to be levied on and sold under execution, the levy is only upon the interest which remains after payment of the security; or, in other words, upon the equity of redemption; but, for the purpose of the levy and sale of such interest, the officer may take possession of the property, as against both the mortgagor and the mortgagee. (*Collins v. State*, 298.)

9. EXECUTION—LEVY UPON MORTGAGED PERSONALTY—DAMAGES.—In an action upon a constable's bond for levying upon mortgaged personal property and wrongfully allowing it to be removed beyond the reach of the mortgage, the measure of damages is the value of the property, where such value is found to be less than the amount of the debt, but if the value of the property is more than the debt, the amount of the indebtedness furnishes the measure for the amount of damages. (*Collins v. State*, 298.)

10. EXECUTION—MORTGAGED PERSONALTY—CHANGE OF POSSESSION—OFFICER'S LIABILITY.—A complaint in an action on a constable's bond, alleging that a chattel mortgage was given to indemnify the mortgagees against any loss on account of their being sureties on certain notes; that it provided that the mortgagor was bound to pay the notes at a certain time, and contained a further provision that, if the mortgaged property should be levied on, this, as well as default in payment, should entitle the mortgagees to take immediate possession without process of law, and the same should become the absolute property of the mortgagees; that the mortgaged property was levied upon by a constable, and sold to satisfy a judgment against the mortgagor, junior to the mortgage; that the property was delivered to the holders of the junior judgment without the constable requiring the purchasers to comply with the terms of the mortgage; that the mortgage had been duly recorded; that the notes were due and unpaid; and that the mortgagor, the principal on said notes, was wholly insolvent and unable to pay the same, states a good cause of action, though the mortgagees did not pay out anything on account of their suretyship, as this would not be a defense. The constable must be held to know that a liability had accrued to the mortgagees by the terms of the mortgage; and that the purchaser had acquired nothing at the sale except the

mortgagor's equity of redemption; and, while he had nothing to do with passing upon the questions involved in the mortgage, it was his duty to hold possession of the property until those questions were settled, and, by sooner surrendering the possession, he did so at his peril. (*Collins v. State*, 298.)

11. EXECUTION—MORTGAGED PERSONALTY—DUTY AND LIABILITY OF OFFICER.—An officer levying upon mortgaged personal property and selling it upon execution, the lien of which is junior to that of the mortgage, must hold it until the terms of the mortgage have been complied with by the purchaser, and, if he fails to do so he is liable on his official bond for any damage sustained by the mortgagee. (*Collins v. State*, 298.)

12. EXECUTION—MORTGAGED PERSONAL PROPERTY—DUTY OF OFFICER.—An officer levying on mortgaged personal property must exercise due care for the protection of the mortgagee's interest, and is prohibited, not only from diverting such property from the security of the mortgage, but from doing anything which would have the effect of diminishing its value as such security. If the mortgage has been recorded, he is bound to take cognizance of it without any other notice. (*Collins v. State*, 298.)

13. WRITTEN CLAIM OF PROPERTY LEVIED UPON in the hands of one who holds it under a conditional sale, notifying the sheriff that the claimant is the owner of the property, that the execution debtor holds it only for the purposes of resale, that he held it when seized for such purposes only, and not otherwise, sufficiently states the grounds of title required by section 689 of the Code of Civil Procedure of California. (*Vermont Marble Co. v. Brow*, 87.)

14. EXECUTION SALES—CHANGE IN THE OFFICE OF SHERIFF.—If the sheriff who levies an execution on real property, and advertises it for sale, goes out of office before the day appointed for the same, it may be made by his successor in office. (*Lewis v. Bartlett*, 885.)

See Courts.

EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS—CLAIM AGAINST ESTATE.—It is sufficient to file a note, executed by one deceased, against his estate, without accompanying the same with a formal complaint. (*Garrigus v. Home etc. Missionary Society*, 262.)

See Trusts, 2.

EXEMPTIONS.

See Assignment for the Benefit of Creditors, 3-7; Execution, 1-4.

EXPERTS.

See Witnesses.

FALSE IMPRISONMENT.

1. FALSE IMPRISONMENT—CHARACTER AND REPUTATION OF PLAINTIFF.—In an action for false imprisonment, evidence of the good reputation of the plaintiff prior to his arrest without warrant is not admissible, where no attempt has been made to show that such reputation was bad. (*Diers v. Mallon*, 598.)

2. TREATMENT OF PRISONER.—IN AN ACTION FOR FALSE IMPRISONMENT in making an arrest and detaining the plaintiff without warrant, and placing him in irons, the question to be submitted to

the jury is, whether the defendant used force and violence upon the person of the plaintiff in excess of what was reasonably necessary, under the circumstances, to safely detain and keep him; and, if there was no such excess, there can be no recovery, provided the circumstances were such as to justify the arrest, though it was subsequently ascertained that the plaintiff was not guilty of the crime of which he was accused. (*Diers v. Mallon*, 598.)

See Arrest.

FALSE REPRESENTATIONS.

See Contracts, 5; Fraud, 2.

FEEES.

See Justices of the Peace; Receivers, 1.

FELLOW-SERVANTS.

See Railroads, 25.

FENCES.

See Railroads, 30, 31.

FIRES.

See Landlord and Tenant, 1, 2; Real Property, 4-6.

FORECLOSURE.

See Injunctions, 6; Mortgages, 9.

FOREMAN.

See Master and Servant; Railroads, 25.

FORFEITURE.

See Descent; Equity, 3; Vendor and Purchaser, 10.

FORMER JEOPARDY.

FORMER JEOPARDY.—One who procures a reversal of a judgment of conviction waives his right of objection to a second trial, on the ground that he has been once in jeopardy. (*McGinn v. State*, 617.)

FRAUD.

1. **FRAUD IS A QUESTION OF FACT**, and, when essential to a cause of action, must be found as a fact, and not left to be inferred as matter of law. (*National State Bank v. Vigo County Nat. Bank*, 330.)

2. **IN AN ACTION FOR FALSE REPRESENTATIONS**, it is not necessary to allege or prove a scienter. Therefore, evidence of other false representations made by the defendant respecting the same matter, at or about the same time, but to another person than the plaintiff, is not admissible. (*Johnson v. Gulick*, 629.)

See Assignment for the Benefit of Creditors, 7; Injunctions, 2; Judgments, 7; Marriage and Divorce.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCES.**—To avoid a conveyance as fraudulent, the complaint must expressly charge that the instrument

was executed with a fraudulent intent. (National State Bank v. Vigo County Nat. Bank, 830.)

2. FRAUDULENT CONVEYANCES—VALIDITY OF AS BETWEEN THE PARTIES.—A conveyance made to hinder, delay, or defraud the grantor's creditors is valid between the parties thereto when there is a consideration to support it. (Bradtfieldt v. Cooke, 701.)

3. FRAUDULENT CONVEYANCES—VALIDITY OF, AS TO CREDITORS.—There is a marked distinction between contracts which are void ab initio, and those which are void only as to third persons. A fraudulent conveyance is not void, but merely voidable at the suit of the creditor, and is, therefore, capable of ratification. (Bradtfieldt v. Cooke, 701.)

4. FRAUDULENT CONVEYANCES—ENFORCEMENT OF, BETWEEN THE PARTIES—CONSIDERATION.—If the owner of one piece of land, for the purpose of defrauding his creditors, conveys another piece, in which he has no interest, and takes from his grantee, at the same time and as part of the same transaction, a note, and a mortgage on the first piece of property to secure its payment, there is a consideration for the note and mortgage, and the contract is enforceable between the parties thereto. (Bradtfieldt v. Cooke, 701.)

FREIGHT CHARGES.

See Carriers, 4, 15, 16; Interstate Commerce, 6.

GARNISHMENT.

See Attachment, 4, 5; Carriers, 17; Interstate Commerce, 5.

GIFTS.

GIFTS, EVIDENCE TO DISPROVE.—The fact that the grandfather of a minor having funds of the latter in his hands, and making expenditures for her benefit, keeps an account in which all such expenditures are charged against her, is sufficient to rebut any presumption, or loose declarations, tending to show that such expenditures were made by way of gifts. (Gilfillen's Estate, 760.)

GUARANTY.

1. GUARANTY, CONTINUING—INDORSEMENTS—RENEWALS.—If a member of an insolvent banking firm sends to the cashier of another bank, holding a large amount of commercial paper indorsed by such firm, a writing authorizing his copartner to use the name of the writer, "as one of the firm, as indorsers on paper" sent to such cashier to renew the indorsed paper, such writing authorizes the continuance of the use of the firm name as indorser, and is not confined to renewals of the particular paper held by the bank at the time it was given, but invests the copartner to whom it was given with power to continue such renewals until the paper can be retired by collection. (First Commercial Bank v. Talbert, 885.)

2. GUABANTY, CONTINUING—REORGANIZATION OF BANK.—A national bank which is the reorganizaton of a state bank, with the same assets, liabilities, officers, and stockholders, retains its identity, so that a guaranty of payment made to the state bank can be enforced by the reorganized bank. (First Commercial Bank v. Talbert, 885.)

3. GUARANTY, ASSIGNMENT OF.—If a person guarantees the payment to a corporation of any and all indebtedness or liability then or thereafter owing to it from another designated person, and notes subsequently executed by the latter to the former are assigned

by him, together with all securities he may hold securing any property or indebtedness, the assignee is entitled to the benefit of the guaranty and may maintain an action thereon against the guarantor. (*Anchor Investment Co. v. Kirkpatrick*, 417.)

GUARDIAN AND WARD.

1. **GUARDIAN, PERSON ACTING AS WITHOUT AUTHORITY, RIGHT OF TO CREDITS.**—If a person coming into possession of the funds of a minor makes such use of them as he ought to have made had he been a regularly appointed guardian, and such as any orphans' court having jurisdiction would have authorized him to make, he will, on subsequently being sued, or otherwise called to account, by such minor, be allowed credits for all sums so expended. (*Gillfillen's Estate*, 760.)

2. **GUARDIAN AND WARD—RIGHT OF GUARDIAN TO REIMBURSEMENT.**—A guardian has an equitable right to be reimbursed for all reasonable expenses properly incurred in the execution of his trust, and they are a lien on the estate which he is not compelled to part with until his disbursements are paid. (*Curran v. Abbott*, 337.)

3. **GUARDIAN AND WARD—LIEN FOR REIMBURSEMENT.**—A guardian has an equitable lien for reimbursement for expenses paid by him in procuring a judgment in favor of his ward's estate. This lien extends to the judgment, and all persons dealing with reference to such judgment must take notice of the lien. (*Curran v. Abbott*, 337.)

4. **GUARDIAN AND WARD—ENFORCEMENT OF LIEN FOR REIMBURSEMENT.**—An equitable lien of a guardian for reimbursement for expenses paid in procuring a judgment in favor of his ward's estate may be enforced against such estate, although the ward has assigned his interest therein after reaching majority, and regardless of the question of fraud between the ward and his assignee. (*Curran v. Abbott*, 337.)

5. **GUARDIAN AND WARD—ENFORCEMENT OF EQUITABLE LIEN FOR REIMBURSEMENT.**—A guardian may enforce his equitable lien against his ward's estate for expenses paid in procuring a judgment in favor thereof, whether the guardian is personally liable for such expenses, or liable therefor only in his fiduciary capacity. (*Curran v. Abbott*, 337.)

6. **GUARDIAN AND WARD—LIEN FOR REIMBURSEMENT.**—If a guardian has an equitable lien for reimbursement from his ward's estate for expenses incurred in procuring a judgment in favor thereof, and has other funds in his hands besides such judgment, he may be compelled to exhaust such funds before resorting to the judgment for reimbursement. (*Curran v. Abbott*, 337.)

7. **GUARDIAN AND WARD—LIEN FOR REIMBURSEMENT—ACCOUNTING.**—A guardian can enforce against his ward's estate an equitable lien for reimbursement for expenses incurred by him in behalf of such estate, without an accounting and settlement of his guardianship, although the ward has become of full age. (*Curran v. Abbott*, 337.)

See Courts.

HEIRS.

See Descent.

HIGHWAYS.

1. **HIGHWAYS.—EASEMENTS OF ACCESS OF LIGHT AND OF AIR** are all confined to the street in front of the lot. When a

remote obstruction does not affect these, there is no injury in a legal sense, and though access to property is rendered more inconvenient or more circuitous by such obstruction, yet no right of action arises therefrom. (*Dantzer v. Indianapolis etc. Ry. Co.*, 343.)

2. HIGHWAYS.—AN OBSTRUCTION of the easement of access need not always be upon the immediate front of the lot whose owner is affected. If the obstruction, though remote, renders access to the lot impossible, or impairs it in a substantial manner at the point where it abuts upon the street, the property right of the owner is invaded, and he may recover; but his recovery is limited to injury different in kind, and not simply in degree, from that suffered by the community in general. (*Dantzer v. Indianapolis etc. Ry. Co.*, 343.)

3. HIGHWAYS—DAMAGES FOR OBSTRUCTION OF ACCESS. Mere inconvenience or disadvantage, so long as an obstruction in a street or highway complained of does not, in some substantial degree, impair or deprive the lotowner of the usual and ordinary means of access to his property, does not give a right of action. (*Dantzer v. Indianapolis etc. Ry. Co.*, 343.)

4. HIGHWAYS—DAMAGES FOR OBSTRUCTION OF ACCESS. Inconvenience of access, arising from obstructions in the side of the street remote from the property obstructed, is *damnum absque injuria*. (*Dantzer v. Indianapolis etc. Ry. Co.*, 343.)

5. HIGHWAYS—OBSTRUCTION TO ACCESS—DAMAGES.—Whether one whose access to his property has not been cut off by the vacation of part of a street has suffered legal injury therefrom for which he may recover is a question of law. The degree of injury suffered is a question of fact. (*Dantzer v. Indianapolis etc. Ry. Co.*, 343.)

HOMESTEADS.

1. HOMESTEAD.—AFTER A MORTGAGE IS MADE to secure the purchase price of land, no homestead can be carved out of the property so as to impair the rights of the mortgagee. (*Van Sandt v. Alvis*, 25.)

2. MORTGAGE ON HOMESTEAD—RIGHT TO PERSONAL ACTION ON NOTE.—If a mortgage is executed by husband and wife upon a homestead, the mortgagee cannot bring an action and recover a personal judgment upon the mortgage note against the husband without foreclosure of the mortgage, on the ground that the mortgage lien is extinguished by failure of the mortgagee to present the claim against the estate of the deceased wife. (*Hibernia Savings and Loan Society v. Thornton*, 52.)

3. MORTGAGE UPON HOMESTEAD—DEATH OF SPOUSE—RIGHT TO FORECLOSE OR TAKE PERSONAL JUDGMENT.—If a mortgage is executed by husband and wife upon a homestead which is afterwards set apart to the surviving spouse, the mortgagee can neither maintain his action to foreclose, nor have a personal judgment against the survivor, unless he first presents his claim against the estate of the deceased spouse. (*Hibernia Savings and Loan Society v. Thornton*, 52.)

4. HOMESTEAD—MORTGAGE OF—STATUTE OF LIMITATIONS.—If a purchaser of land, after giving a mortgage thereon for its purchase price, declares a homestead upon the mortgaged premises, and then applies to the mortgagee for an extension of time, and gives a new note and mortgage upon the homestead premises for the amount of the debt without his wife joining therein, the second mortgage is void as against the wife, but the first mortgage, having been satisfied only for the purpose of giving effect to the

second one, is, in equity, deemed to be and remain in force until the demand secured thereby is barred by the statute of limitations, and, as to the part not so barred, it may be foreclosed against the homestead. (*Van Sandt v. Alvis*, 25.)

5. MORTGAGE OF HOMESTEAD FOR UNPAID PURCHASE MONEY NOT SIGNED BY HUSBAND.—If land is purchased by contract, the purchaser using it as a homestead, and the vendor retaining the legal title as security for the unpaid purchase money, and subsequently, at the request of the purchaser, executing to the latter's wife a warranty deed to the land, she at the same time, and as part of the same transaction, executing to the vendor a mortgage on the land to secure such unpaid purchase money, such mortgage is valid, as security for the payment of such money, though not signed by the husband, and given to secure other and additional indebtedness of him. (*Roby v. Bismarck Nat. Bank*, 688.)

6. MORTGAGE OF HOMESTEAD FOR UNPAID PURCHASE MONEY, executed by the fee owner, need not be signed by the husband or wife of such owner; and if such mortgage is given in part to secure indebtedness other than the purchase money, it is valid to the extent of the purchase money, though void as to the residue. (*Roby v. Bismarck Nat. Bank*, 688.)

HOMICIDE.

1. CRIMINAL LAW.—THE CORPUS DELICTI IN MURDER consists of two elements, viz: the death and the criminal agency of another in causing it. (*Campbell v. People*, 184.)

2. CORPUS DELICTI.—CIRCUMSTANTIAL EVIDENCE may be sufficient to establish the fact of death in prosecutions for murder, as well as all the other elements of corpus delicti. (*Campbell v. People*, 184.)

See Accessories, etc.; Arrest, 5, 8.

HOTELS.

See Innkeepers.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE.—AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS may be maintained without proof of adultery. Such an action, whether adultery is charged or not, is an action for seduction, and the wife is, under the statute, incompetent as a witness in such cases. (*Adams v. Main*, 266.)

2. AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS is based on the loss of the consortium, and proof of actual pecuniary loss is not essential to recovery. (*Adams v. Main*, 266.)

3. EVIDENCE.—IN AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS, after the husband, who is plaintiff, has shown that, while the children were sick, their mother left them, and accompanied the defendant to places of amusement, it is proper to exclude testimony of a general character as to how the plaintiff's wife treated her children. (*Adams v. Main*, 266.)

4. EVIDENCE.—IN AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS, it is harmless error, if any, to permit the husband, who is plaintiff, to ask a witness if she had ever heard the neighbors talk about his wife and the defendant going to a show, if a negative reply is given. (*Adams v. Main*, 266.)

5. INSTRUCTIONS.—IN AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS, where the husband is plaintiff, it is

not error to charge the jury that he cannot recover if the defendant made presents to her, and gave her other attentions, with the consent of the husband, the defendant having no evil intent, and not having had carnal knowledge of her, although she conceived a fondness for him, as a consequence of such acts. (Adams v. Main, 266.)

6. INSTRUCTIONS.—IN AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS, it is not error to charge the jury that no inference is to be drawn for or against either party from the fact that the wife has not testified. She is, under the statute, incompetent as a witness in such an action. (Adams v. Main, 266.)

7. HUSBAND AND WIFE — LOSS OF SERVICES. — The fact that a wife lives with her mother, and that her husband is not able to support her in her injured condition, does not prevent him from recovering for the loss of her services, caused by an injury to her through the negligence of a third person. (Bowdle v. Detroit etc. R. R. Co., 366.)

8. HUSBAND AND WIFE — DAMAGES FOR LOSS OF SERVICES.—A husband suing to recover for an injury sustained by his wife through negligence, and alleging that since the accident he has been deprived, and during the life of the wife will be deprived, of her fellowship, society, aid, comfort, and assistance in his domestic affairs, can recover only the value of such services as the wife would have been likely to render in the discharge of her domestic duties. (Bowdle v. Detroit etc. R. R. Co., 366.)

See Homesteads, 3-6; Marriage and Divorce.

IDEM SONANS.

See Names.

INDEBTEDNESS.

See Municipal Corporations, 4.

INDECENCY.

1. OBSCENE PICTURES. — A negative from which an obscene picture may be made is a picture, and sitting for such negative is procuring it. (People v. Ketchum, 383.)

2. OBSCENE PICTURES—INTENT.—Evidence that the person informed against sat for a negative from which an obscene photograph was produced, without more, is not sufficient to justify a conviction, under a statute making it an offense to procure any obscene picture for the purpose of sale, exhibition, loan, or circulation. (People v. Ketchum, 383.)

INDORSEMENT.

See Bills of Lading; Checks, 1; Negotiable Instruments, 6-8.

INFANTS.

See Master and Servant, 2, 3, 9.

INFORMERS.

See Penalties, 3, 4.

INJUNCTIONS.

1. **TRADE NAMES.—ANY SIMILARITY OF NAME** likely to deceive or mislead an ordinary unsuspecting customer, and divert and secure his trade from the person who established a tradename, is a fraud which may be restrained by injunction. (*Weinstock v. Marks*, 57.)

2. **TRADE NAME—INFRINGEMENT—INJUNCTION.**—If one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the public by causing them to trade with him when they intended to trade, and would have otherwise traded, with his rival, he commits a fraud which may be restrained by injunction. (*Weinstock v. Marks*, 57.)

3. **TRADE NAMES AND BUILDINGS—INFRINGEMENT.**—When one has built up a particular business under a certain name in a house of a certain style of architecture, another engaged in a similar business, who adopts a similar name, and erects a building of precisely similar architecture, for the fraudulent purpose of drawing away the customers of the other by such deception, he may be restrained by mandatory injunction, and compelled to distinguish his place of business in some mode or form sufficient to indicate to the public that it is a different place of business from the other. (*Weinstock v. Marks*, 57.)

4. **INJUNCTIVE RELIEF MAY BE GRANTED TO PREVENT A LANDED PROPRIETOR FROM CAUSING** filthy and contaminated water to percolate from his soil into the adjacent lands, to the injury of his neighbor. (*Barrett v. Mt. Greenwood Cemetery Assn.*, 168.)

5. **WATERS AND WATERCOURSES, FURTHER POLLUTION.** The fact that a watercourse is already polluted and contaminated by various causes does not entitle other persons to add thereto, nor preclude persons through whose lands the watercourse flows from obtaining relief by injunction against its further pollution. (*Barrett v. Mt. Greenwood Cemetery Assn.*, 168.)

6. **MORTGAGES — FORECLOSURE — DEFICIENCY JUDGMENT—INJUNCTION.**—If a mortgagor conveys the mortgaged premises to a third person, who agrees to pay the mortgage debt but fails to do so, an agreement between the original mortgagor and the mortgagee, that the latter is not to take any deficiency judgment against the former upon foreclosure, is without consideration, and the mortgagor who makes default in the foreclosure suit upon the faith of such agreement, but without having any legal defense, or suffering injury thereby, cannot enjoin the enforcement of a deficiency judgment rendered against him in violation of such agreement. (*Helm v. Butin*, 54.)

See Trademarks, 1.

INNKEEPERS.

1. **INNKEEPERS—LIABILITY.**—An innkeeper is *prima facie* liable for any loss or injury to the goods of his guest, not caused by an act of providence, the public enemy, or the fault of the guest; and the burden of proof is on the innkeeper to exculpate himself by evidence that the loss did not happen through any neglect or fault on his part or that of his servants. (*Bowell v. De Wald*, 240.)

2. **INNKEEPERS—LIABILITY—PLEADING.**—An innkeeper is *prima facie* liable for the loss of the goods of his guest, and, in an action by the latter to recover for such loss, the complaint need not

allege negligence on the part of the innkeeper, nor that the guest was without fault. (*Bowell v. De Wald*, 240.)

3. **INNKEEPERS—LIABILITY—NEGLIGENCE OF GUEST.**—The failure of a guest to inform an innkeeper, or his servant, that his baggage contains valuables, for the loss of which he seeks to recover, is not negligence on his part. (*Bowell v. De Wald*, 240.)

INSANE PERSONS.

AN INSANE PERSON IS LIABLE for his torts, but, not being capable of forming a malicious intention, is not answerable in vindicatory damages. (*Holdom v. Ancient Order of United Workmen*, 183.)

See Insurance, 17; Witnesses.

INSTRUCTIONS.

1. **ALTHOUGH INSTRUCTIONS GIVEN FOR PLAINTIFF IGNORE** facts tending to establish the defense, the defendant cannot complain, if the theory of the defense is fully explained in instructions given at his request. (*Meadows v. Pacific etc. Ins. Co.*, 427.)

2. **JURY TRIAL—INSTRUCTIONS—CONSTRUCTION.**—It is not necessary that each instruction should contain the whole law of the case, or any branch of the case with recognized exceptions. If an instruction contains a complete statement of a proposition of law applicable to the facts in a given case, it is good as part of a series containing the entire law of the case. All of the instructions must be considered together, and construed with reference to each other. (*Taylor v. Wootan*, 200.)

3. **INSTRUCTIONS ON THE NEGLIGENCE OF A MASTER**, wholly ignoring the contributory negligence of the servant, are not erroneous, if such contributory negligence is fully and clearly expounded in other instructions. (*Taylor v. Wootan*, 200.)

4. **THERE IS NO ERROR IN REFUSING INSTRUCTIONS** upon matters which it is the duty of the court to determine for itself as matters of law, and which it does so determine. (*Diers v. Mallon*, 598.)

5. **INSTRUCTIONS—APPEAL.**—No ground is presented for review on appeal, because of the refusal to give instructions requested, if it appears that they were not asked until after the commencement of the argument. (*Adams v. Main*, 266.)

INSURANCE.

1. **INSURANCE.—CONDITIONS** in a policy of insurance should be strictly construed against the insurer, and liberally in favor of the assured. (*Georgia etc. Ins. Co. v. Bartlett*, 832.)

2. **INSURANCE—WAIVER.**—The delivery of a policy of insurance, with knowledge of other insurance on the same property, waives the condition in the policy making it void if the assured has other insurance. (*Anderson v. Manchester etc. Assur. Co.*, 400.)

3. **IN CONSIDERING THE CONDITIONS AND PROHIBITIONS IN A POLICY OF INSURANCE**, the parties must be presumed to have intended, the one to insure, and the other to obtain insurance on, the subject matter of insurance as it necessarily was at the time, and must continue to be during the life of the policy. (*Fraim v. National etc. Ins. Co.*, 753.)

4. **INSURANCE—PAROL EVIDENCE OF THE MEANING OF A WORD.**—If insurance is effected on a building and its contents, parol

evidence is admissible, not only to show what these contents were, but further that it was understood between the parties that such contents should continue to be covered by the insurance, though they had been removed to another building, and the building in which they were when an insurance was effected was not injured by the fire. Hence, under a policy insuring a smokehouse and its contents, it is not error to admit evidence that the insurer was shown the house, and was told that insurance on the meats to be smoked therein was desired, and that such meats, when smoked, would be stored, and that, with full knowledge of the facts, the insurer selected the word "contents" as a proper and sufficiently descriptive word to cover the smoked meats, whether in the smokehouse undergoing process of smoking, or in the storeroom after its completion. (*Graybill v. Penn etc. Ass'n*, 747.)

5. AN INSURER IS ENTITLED TO BE SUBROGATED to the rights of a mortgagee on paying a policy of insurance in his favor, where such policy, as against the mortgagor, has become void because of a breach of some of the conditions thereof. (*Gibb v. Philadelphia etc. Ins. Co.*, 405.)

6. INSURANCE.—THERE IS NO PRESUMPTION that statements and representations, made to the general or local agents of an insurer, have been communicated to the home office of the company, or were known to the president or secretary thereof, when the policy issued. (*Ward v. Metropolitan etc. Ins. Co.*, 80.)

7. INSURANCE—CHANGE IN TITLE AND POSSESSION.—The appointment of a receiver is not such a change in the title or possession of property as avoids a policy of insurance containing a condition that it shall become void if any change takes place in the title or possession of the property, whether by sale or judicial decree, without notice to the insurer and its consent indorsed thereon. (*Georgia etc. Ins. Co. v. Bartlett*, 832.)

8. INSURANCE, CHANGE OF INTEREST.—The sale of real property and the receipt of part of the purchase price, with an agreement, on completion and payment of the balance, that the purchaser should be entitled to possession until he made default in such payment, is such a change as renders void a pre-existing policy of insurance containing a stipulation that it shall become void if any change, other than by the death of the assured, shall take place in the interest, title, or possession of the property insured. (*Gibb v. Philadelphia etc. Ins. Co.*, 405.)

9. INSURANCE.—A CHANGE OR TRANSFER of the interest of the insured which will avoid a policy, under a condition therein declaring it shall become void if such a change takes place without the consent of the insurer, must be of such a character as is calculated to make him less watchful in caring for and preserving the property insured; but if the real ownership remains the same, though there is a change in the evidence of title, such change being merely nominal, and not of a nature calculated to diminish the motives of the assured to guard it from loss, the policy is not violated. (*Georgia etc. Ins. Co. v. Bartlett*, 832.)

10. INSURANCE.—APPOINTMENT OF A TRUSTEE to take the place of other trustees who held the property in trust when the insurance was effected, is not a change in the title or possession, within the meaning of a condition in a policy making it void if a change takes place in the title or possession without the consent of the insurer. (*Georgia etc. Ins. Co. v. Bartlett*, 832.)

11. INSURANCE.—A CONDITION IN A POLICY OF INSURANCE AGAINST THE USE OR KEEPING OF GASOLINE on the insured premises, is not broken by the use of gasoline to an extent necessary to carry on the business for which the insurer knew that the property insured was used, and where both parties must have known

either that the business insured must be discontinued or gasoline used therein. (*Fraim v. National etc. Ins. Co.*, 753.)

12. TO JUSTIFY THE USE OF GASOLINE ON INSURED PREMISES, on the ground that such use was necessary to continue the business which the insurer knew to be the one carried on by the assured, the necessity need not be absolute, nor need it be proved that the gasoline was of such vital importance to the business that it could not be ignored. It is sufficient that the gasoline was in ordinary use by the trade for the attainment of the results for which it was employed by the assured. (*Fraim v. National etc. Ins. Co.*, 753.)

13. INSURANCE—CONSTITUTIONAL LAW.—A statute directing the insurance commissioner of the state to prepare and adopt a blank policy, together with such provisions and conditions as may be added thereto, or indorsed thereon to form a part thereof, such form to conform as near as the same can be made practicable to the form known as the New York Standard Life Insurance Policy, and requiring all insurance corporations, after the adoption of such form, to use it in all policies for fire insurance, and all renewals thereof, does not, of itself, adopt the form referred to as in use in New York, but leaves the commissioner a discretion to add to, or omit from, the provisions of such policy, and is, therefore, void, because it delegates to the commissioner legislative power which can be exercised only by the legislative department of the state. (*Anderson v. Manchester etc. Assur. Co.*, 400.)

14. NOTICE TO AGENT AS NOTICE TO PRINCIPAL.—If each statement in the application for a policy of life insurance is warranted to be true, when, in fact, some of them are untrue, provisions inserted in the policy, that it shall be void if any statement in the application is untrue, that it shall not be varied by any notice or representations, not brought to the actual knowledge of one of the company's principal officers, and that there shall be no waiver not authorized by the company, exclude the operation of the rule that notice to the agent who negotiates a contract is notice to the principal. Hence, in a suit on the policy, where the company sets up a breach of warranty, it is error to instruct the jury that, if the local agent, when he forwarded the application to the home office with his approval, knew that material statements therein were false, and that if he, with such knowledge, collected and remitted the accruing premiums after the policy was issued, his knowledge was the knowledge of the company, and estopped it from setting up the breach of warranty. (*Ward v. Metropolitan etc. Ins. Co.*, 80.)

15. INSURANCE, LIFE—BREACH OF WARRANTY—WANT OF NOTICE TO PRINCIPAL.—If each statement in the application for a policy of life insurance is warranted to be true, when, in fact, some of them are untrue, and the policy contains provisions that it shall not be varied by any notice or representations not brought to the actual knowledge of one of the company's principal officers, and that there shall be no waiver not authorized by the company, and suit is brought upon the policy, the defendant's request that the jury be instructed to return a verdict in its favor should be granted, if a plain breach of warranty has been proved, and there is no evidence that such breach was known to the president or secretary of the company until after the death of the insured. (*Ward v. Metropolitan etc. Ins. Co.*, 80.)

16. INSURANCE, LIFE—PAROL EVIDENCE—BREACH OF WARRANTY—PRESUMPTION.—If each statement in the application for a policy of insurance is warranted to be true, when, in fact, some of them are untrue, and the policy stipulates that it shall be void if any statement in the application is untrue, that the policy

cannot be varied by any notice or representations not brought to the actual knowledge of one of the company's principal officers, and that there shall be no waiver not authorized by the company, parol evidence, in a suit upon the policy, after the death of the insured, of statements and representations made to and by the general and local agents of the company, for the purpose of showing a waiver of the breach of the warranty contained in the policy, and that the company is estopped from setting up such breach as a defense. is admissible to show such waiver and estoppel. (*Ward v. Metropolitan etc. Ins. Co.*, 80.)

17. INSURANCE, LIFE—PAYMENTS PREVENTED BY INSANITY OF THE ASSURED.—If a person, by express contract, engages absolutely to do an act not impossible or unlawful at the time, neither inevitable accident, nor other unforeseen contingency not within his control, will excuse him. Hence, if a member of an assessment insurance company promises to pay certain mortuary assessments, and a stated sum annually for expenses, within thirty days after notice that the same is due; payment by the insured of the stipulated sums as they become due is a condition precedent to any subsequent liability on the part of the company, though the mental faculties of the insured, at the time of receiving notice of a mortuary assessment, are so far impaired as to prevent him from doing business. (*Pitts v. Hartford etc. Ins. Co.*, 96.)

18. LIFE INSURANCE—WHEN TIME IS OF ESSENCE OF CONTRACT TO MAKE PAYMENTS.—If a certificate of membership in an assessment insurance company provides that the insured shall make certain payments when due; that the certificate shall be null and void if the payments are not so made; and that all moneys paid thereon shall be forfeited to the company in case of neglect to make any required payment, the time of payment is of the very essence of the contract, and nonpayment, when the money is due, involves absolute forfeiture, and releases the company from liability without any affirmative action on its part. (*Pitts v. Hartford etc. Ins. Co.*, 96.)

19. LIFE INSURANCE—NOTICE OF ASSESSMENT, VALIDITY OF.—A notice of a mortuary assessment, sent to a member of an assessment insurance company, is not rendered defective by the fact that it includes an item for three months' expenses in advance, which the insured had for seven years elected to pay quarterly, rather than monthly. (*Pitts v. Hartford etc. Ins. Co.*, 96.)

20. INSURANCE, LIFE.—THE KILLING OF THE ASSURED BY AN INSANE BENEFICIARY, under such circumstances as would make the killing murder if the beneficiary were sane, does not forfeit the latter's right to recover the insurance money. (*Holdom v. Ancient Order of United Workmen*, 183.)

21. INSURANCE, LIFE—ESTOPPEL.—A life insurance company cannot be estopped from setting up a breach of warranty that all statements in the application for insurance are true, unless it has waived its right to take advantage of it. (*Ward v. Metropolitan etc. Ins. Co.*, 80.)

22. INSURANCE, LIFE.—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER means intentional exposure to such danger. (*De Loy v. Travelers' Ins. Co.*, 787.)

23. EVIDENCE OF VOLUNTARY EXPOSURE TO DANGER.—The intention of the assured to voluntarily expose himself to unnecessary danger may be inferred from his acting so recklessly and carelessly as to show an utter disregard of known danger, or from his taking a risk of a danger which is so obvious that a prudent man, exercising reasonable

forethought, would not have taken it. (*De Loy v. Travelers' Ins. Co.*, 787.)

24. A CONDITION EXEMPTING THE INSURER FROM LIABILITY for injuries suffered by the assured while walking or being on a railway bridge or roadbed, does not extend to injuries suffered by him when his business calls him to a track or crossing for a lawful purpose, unless it was in a time of danger, and he willfully exposes himself to such danger. (*De Loy v. Travelers' Ins. Co.*, 787.)

25. A CONDITION IN A POLICY EXEMPTING AN INSURER from liability for injuries suffered by the assured while on a railway roadbed does not extend to the whole right of way, but only to that space where a person might be injured by cars running along the track. (*De Loy v. Travelers' Ins. Co.*, 787.)

26. INSURANCE—ACCIDENT—BURDEN OF PROOF.—Under a policy insuring against death from such violent and accidental injuries as shall externally be visible on the body, and which alone cause death, evidence that the insured was found dead and mangled on a railroad track, establishes a prima facie case, and casts the burden of proof upon the insurer to show that death resulted from a violation of some of the conditions in the policy specially pleaded in defense. (*Meadows v. Pacific etc. Ins. Co.*, 427.)

27. INSURANCE — ACCIDENT — ROADBED.—A space between railroad tracks, constituting a well-beaten, level, and smooth walk is not a part of the roadbed, within the meaning of an accident insurance policy, not insuring against accidents "on a railroad bridge, trestle, or roadbed." (*Meadows v. Pacific etc. Ins. Co.*, 427.)

28. INSURANCE — ACCIDENT — PRESUMPTION.—A person whose death is caused by injury is presumed to have been in the exercise of ordinary care at the time of his death. This presumption is not rebutted by the unexplained fact that his body was found mangled upon a railroad track. (*Meadows v. Pacific etc. Ins. Co.*, 427.)

INTEREST.

INTEREST—LIABILITY OF STATE.—The state is not liable for interest upon matured coupons of Indian war bonds issued under a statute which does not expressly subject it to such liability. (*Molineux v. State*, 49.)

See Penalties, 2; Statutes, 7.

INTERPLEADER.

REFUSAL TO SURRENDER GOODS—INTERPLEADER.—In an action against a carrier, or other bailee, to recover for the refusal to surrender the goods to a person other than the bailor, claiming to be the owner, the bailee may, by answer in the nature of an interpleader, require the claimants to litigate and determine the question of title between themselves. (*Shellenberg v. Fremont etc. R. R. Co.*, 561.)

INTERSTATE COMMERCE.

1. INTERSTATE COMMERCE.—THE QUESTION WHETHER A PACKAGE in which goods are offered for sale and sold is an original package, is a question for the jury when the facts are in dispute, but is a question of law when they are agreed upon, and are presented by a special verdict. (*Commonwealth v. Paul*, 776.)

2. ORIGINAL PACKAGE.—A package devised by a nonresident manufacturer, adapted for the sale at retail to individual consumers of his goods, and in which they are sold to such consumers by him or his agent, is not an original package, within the meaning of the law relating to interstate commerce. (*Commonwealth v. Paul*, 776.)

3. A STATE HAS POWER TO PUNISH SALES OF OLEOMARGARINE contained in tubs not exceeding ten pounds in weight. To do so is not to interfere with the power of Congress to regulate interstate commerce. (*Commonwealth v. Paul*, 776.)

4. A TUB OF OLEOMARGARINE, CONTAINING TEN POUNDS, put up for the purpose of being sold at retail, is not an original package, the sale of which is protected by the law of interstate commerce. (*Commonwealth v. Paul*, 776.)

5. CARRIERS—INTERSTATE COMMERCE.—A statute permitting the garnishment of common carriers is not a regulation of interstate commerce. (*Landa v. Holck*, 459.)

6. INTERSTATE COMMERCE—FREIGHT CHARGES.—A statute prohibiting an increase in freight rates over the rate charged at the time freight is tendered to a railroad company, is valid, and not in violation of the law of interstate commerce. (*Chicago etc. R. R. Co. v. Wolcott*, 820.)

IRRIGATION.

1. IRRIGATION—NEGLIGENCE IN CONSTRUCTING DITCH—INSTRUCTIONS.—It is error to instruct the jury, in an action for damages, caused by the breaking of the defendant's irrigating ditch, that "it is incumbent upon the defendant to construct its flumes and ditches in such a reasonable and prudent manner as that no damage shall result to the person whose lands are crossed by the ditch." The defendant is thus held not only to the highest degree of care, but is made an insurer against all damages, without regard to the question of negligence. (*King v. Miles City etc. Ditch Co.*, 508.)

2. IRRIGATION—CONSTRUCTION OF STATUTE.—A statute conferring upon irrigation companies power to acquire a right of way for necessary canals and reservoirs, and providing that "no tract of land shall be crossed by more than one ditch," includes lands owned by corporations. (*Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 585.)

3. IRRIGATION—CONSTRUCTION.—A statute conferring upon an irrigation company power to acquire a right of way for necessary canals and reservoirs, and providing that "no tract of land shall be crossed by more than one ditch, canal, or lateral without the written consent and agreement of the owner thereof, if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended," implies that no tract of land shall, without the consent of the owner, be burdened with two or more ditches for watering the same territory. The question is not, whether the first ditch may be so enlarged or extended as to answer the purpose for which the second was designed, but whether it may, as constructed, be made to supply the lands within the reach of both. (*Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 585.)

4. IRRIGATION—CONSTRUCTION OF STATUTE.—A statute conferring upon irrigation companies power to acquire a right of way for necessary canals and reservoirs, does not, in the absence of express provision, confer upon it the right to connect with the ditches of another company, not to take water therefrom, without the consent of the latter company. (*Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 585.)

See Cotenancy, 2; Eminent Domain, 7; Waters, 12, 13.

JEOPARDY.

See Former Jeopardy.

JUDGMENTS.

1. JUDGMENTS VOID FOR WANT OF JURISDICTION.—A personal judgment showing upon its face that the court rendering it

had no jurisdiction, either of the person or of the subject matter, is absolutely void. (Moyer v. Bucks, 251.)

2. JUDGMENTS.—NOTICE BY PUBLICATION, made in the absence of any law authorizing it, is the same in effect as no notice, and a judgment based upon it is void. (Moyer v. Bucks, 251.)

3. NOTICE BY PUBLICATION.—A personal judgment rendered against a defendant in a bastardy proceeding, without his having been arrested or taken into custody, and upon whom no process was served except unauthorized notice by publication, is void. (Moyer v. Bucks, 251.)

4. RES JUDICATA.—A judgment denying the right of the plaintiff to compel the issuing to him of a certificate of stock in lieu of one which has been lost, because he has not given a bond of indemnity, is not conclusive against him in another suit brought for the same purpose, without first giving a bond, when more than four years have intervened between the two suits, during which time the alleged lost certificate has not been heard from, and no other claimant has appeared therefor, and the legislature has enacted a law providing for the renewal of stock certificates which have been worn out, lost, or destroyed. (Gullford v. Western Union Tel. Co., 407.)

5. RES JUDICATA.—THE FINDING OF THE JURY UPON ONE PARAGRAPH ONLY of the complaint, where there is evidence tending to support another paragraph, precludes an action on the cause averred in the paragraph as to which no finding was made. (Adams v. Main, 266.)

6. JUDGMENTS — MODIFICATION — EXTENDING TIME OF PAYMENT.—A judgment prescribing a time within which money must be paid to one party to entitle the other party to the benefit of the judgment, may, in furtherance of justice, be modified by the court, after the expiration of such time, by extending the time for payment, and providing that it may be made to the clerk of the court for the benefit of such former party. (Tyler v. Shea, 660.)

7. JUDGMENT, RELIEF FROM. — WHILE PERJURY of the plaintiff in testifying falsely upon an issue disclosed by the complaint will not, of itself, entitle defendant to relief from a judgment procured thereby, if the facts testified to were not peculiarly or exclusively within the knowledge of the plaintiff, yet such perjury may be considered in connection with other circumstances tending to disclose a fraudulent scheme on the part of the defendant to put it out of the power of the plaintiff to defend the action, and as giving color to his prior acts, which are alleged to have been fraudulent. (Colby v. Colby, 420.)

8. A JUDGMENT BY DEFAULT can be taken only when it appears that the defendant has been duly served with the summons, and has failed to answer the complaint. (White v. Johnson, 726.)

9. JUDGMENT, VACATING FOR EXCUSABLE NEGLIGENCE. It is proper to open a default against a defendant, upon the ground of his excusable negligence, where his attorney was informed by the clerk that no business would be transacted by the court until after a certain date, and, relying upon this statement, he did not appear until such date, when he found that his pending demurrer had been overruled. (Anaconda Min. Co. v. Salle, 472.)

10. JUDGMENT BY DEFAULT, VACATING—TERMS—STATUTE OF LIMITATIONS.—In opening a default against a defendant upon the ground of his excusable negligence, the court commits no error in refusing to impose any terms interfering with his right to interpose the defense of the statute of limitations. (Anaconda Min. Co. v. Salle, 472.)

11. JUDGMENT BY DEFAULT, VACATING—NEGLIGENCE.—It is not negligent, within the meaning of the law as to defaults, for a defendant's attorney not to withdraw a frivolous demurrer, and file an answer, before the demurrer has been disposed of in the ordinary course of practice. (*Anaconda Min. Co. v. Salle*, 472.)

See Equity, 4; Evidence, 14; Process, 3, 4; Scire Facias.

JUDICIAL NOTICE.

See Evidence, 3.

JUDICIAL SALES.

JUDICIAL SALE—OBJECTIONS TO TITLE.—Though the property sold has a frontage somewhat less than that stated in the notice of sale, the purchaser will not be released from his bid on that account, if there was a plat referred to in such notice as being in the commissioner's office, which showed distinctly the true frontage. If he saw this plat, he would not be relieved on proving that he did not examine it. (*Carneal v. Lynd*, 819.)

See Evidence, 9.

JURISDICTION.

JURISDICTION—COLLATERAL ATTACK.—If, after a proceeding in court confirming an assessment-roll, an application is made to the court for an order authorizing the sale of delinquent property, evidence will not be received to prove that an affidavit of the publication of a notice required to authorize such confirmation was not true. (*Hertig v. People*, 162.)

See Actions; Appeal, 1; Judgments, 1; Process.

JUSTICES OF THE PEACE.

JUSTICE OF THE PEACE—EXCESSIVE FEES.—A justice of the peace who demands and receives excessive fees is liable in an action for the statutory penalty therefor; and it is no defense that he had no corrupt motive or intent in collecting them; or that he was ignorant of the fact that the fees were illegal; or that, upon discovery of his extortion, he tendered back the fees; or that the person paying them knew that they were excessive, and kept silent. The question as to voluntary payment, in such a case, is immaterial. (*Leggatt v. Prideaux*, 498.)

KNOWLEDGE.

See Notice.

LABORERS.

See Definitions; Execution, 5, 6.

LANDLORD AND TENANT.

1. VALIDITY OF COVENANT—PUBLIC POLICY.—A covenant in a lease, providing that the lessor shall not be liable for damage caused by fire, is valid and not opposed to public policy as increasing the risks and dangers to the public as to the destruction of its property by fire. (*Stephens v. Southern Pac. R. R. Co.*, 17.)

2. LANDLORD AND TENANT—COVENANT AGAINST LOSS BY FIRE.—Under a covenant in a lease between a railroad company and its lessee of land adjoining its depot grounds, providing that the lessor shall not be liable for damage by fire arising from any cause, the lessee cannot recover for the loss of a warehouse

erected by him on the leased premises, caused by fire negligently set on adjoining lands of the lessor for the purpose of burning grass and rubbish. (*Stephens v. Southern Pac. R. R. Co.*, 17.)

3. BREACH OF COVENANT TO REPAIR.—Upon a breach of a covenant by a landlord to repair, the tenant may repair, and recover the cost thereof from the landlord; or he may rely upon the covenant, and recover all damages proximately flowing from a breach thereof, regardless of the expense or trouble required to make such repairs. (*McCoy v. Oldham*, 208.)

4. BREACH OF COVENANT TO REPAIR—MEASURE OF DAMAGES—SETOFF.—In an action by a landlord to recover rent due, the tenant may set off against his claim the decreased rental value of the premises caused by the breach by the landlord of his covenant to repair the leased premises. (*McCoy v. Oldham*, 208.)

LARCENY.

1. LARCENY.—PROOF OF EMBEZZLEMENT will, under the statutes of Virginia, sustain a common-law indictment for larceny. (*Pitsnogle v. Commonwealth*, 867.)

2. LARCENY.—PROOF THAT A GOLD WATCH was stolen is made out by evidence that the owner gave thirty dollars for it, and that it was represented when he purchased it, as a gold watch. (*Pitsnogle v. Commonwealth*, 867.)

3. LARCENY BY BAILEE.—Proof that the defendant, after receiving a watch as security for a loan, appropriated it to his own use, and by falsely and fraudulently substituting another and different paper from the one given by him to his bailee, he attempted to vest the property in himself as owner, sustains his conviction of the larceny of such watch. (*Pitsnogle v. Commonwealth*, 867.)

LEASE.

See Evidence, 14; Landlord and Tenant.

LEGISLATURE.

CONSTITUTIONAL LAW.—THE LEGISLATURE CANNOT DELEGATE to any person or body the power to determine what the law shall be, except when authorized by the constitution to do so. (*Anderson v. Manchester etc. Assur. Co.*, 400.)

LETTERS.

See Evidence, 9.

LICENSEES.

See Railroads, 28, 29; Real Property, 2, 3.

LIENS.

MISTAKE.—A LIEN discharged by mistake is, in contemplation of equity, still in existence. (*Kern v. Hotelling*, 710.)

LIMITATIONS OF ACTIONS.

1. THE STATUTE OF LIMITATIONS is an honorable defense and one to which all men are entitled as of right. (*Anaconda Min. Co. v. Salle*, 472.)

2. LIMITATION OF ACTION.—The fraudulent concealment, by the principal on a bond, of a cause of action against himself, not only prevents the running of the statute of limitations in his favor,

but it also stops the statute from running in favor of his surety. (*Eising v. Andrews*, 75.)

See Homesteads, 4; Judgments, 10.

LIGHT AND AIR.

See Highways, 1.

LIVESTOCK.

See Carriers, 19; Railroads, 15, 16.

MANDAMUS.

MANDAMUS cannot issue to control the discretion of officers, unless some abuse thereof is shown. (*State v. Rickards*, 476.)

MARRIAGE AND DIVORCE.

DIVORCE PROCURED BY FRAUD, RELIEF AGAINST.—

If a husband, for the purpose of fraudulently procuring a divorce from his wife, and of preventing her from defending any action he may bring, persuades her to go to a foreign country for the benefit of her health, and, while she is in that country, without funds with which to return, serves a summons on her in a suit for divorce, in which her impotency is alleged as a cause for divorce, and knowing her to be unacquainted with the meaning of the word "impotency," he writes to her by letter that the ground of the divorce is barrenness, and that such ground is sufficient to require the granting of divorce by the laws of the state, and he thereafter procures such divorce, upon her default, by fraudulently testifying that she had ever after her marriage been incapable of sexual intercourse, she is entitled to relief from such judgment of divorce, and it will be set aside in equity by the statutes of Minnesota. (*Colby v. Colby*, 420.)

MASTER AND SERVANT.

1. EMPLOYÉS.—This term embraces laborers and servants, and those occupying inferior positions. (*Johnston v. Barrills*, 717.)

2. MASTER AND SERVANT—ASSUMPTION OF RISKS.—A servant is bound to know, and assumes the risk of, all defects in appliances about which he is employed that are open to observation, or can be ascertained by the ordinary exercise of the senses. (*Taylor v. Wootan*, 200.)

3. ASSUMPTION OF RISKS.—MINOR OR INEXPERIENCED SERVANTS, as well as ordinary servants, in their contract of employment assume all risks ordinarily incident to the service, and this includes all of which they have notice and all that are patent and obvious to them. (*Taylor v. Wootan*, 200.)

4. MINEOWNERS—FELLOW-SERVANTS.—A MINING FOREMAN is a fellow-servant of the other employés of the same master, employed in a common business, and he cannot be made liable to them for the negligence of such foreman, if he was a competent man to direct the operations of the mine, and if he was further subject to examination by a board appointed by law, which issued to him a certificate of competency, and his duties were also prescribed by statute; such statute cannot impose upon his employer liability for his negligence or incompetency resulting in injuries to his fellow-servants. (*Durkin v. Kingston Coal Co.*, 801.)

5. A MINING FOREMAN IS LIABLE to his fellow employes for injuries received by the latter from the negligence or incompetency of the former. (*Durkin v. Kingston Coal Co.*, 801.)

6. INSTRUCTIONS TO INEXPERIENCED SERVANTS, in order to relieve the master from liability for injury to them, must be such as to enable them to comprehend the dangers of their situation, and appreciate the necessity of adopting prudent methods for their protection. (*Taylor v. Wootan*, 200.)

7. MENTAL CAPACITY OF SERVANT—DUTY OF MASTER.—It is an actionable wrong for a master to expose in a hazardous employment a servant whom he knows to be lacking in capacity to understand and appreciate the dangers surrounding him, however much he may have been instructed. (*Taylor v. Wootan*, 200.)

8. INFANT EMPLOYÉS.—A master may employ an infant in a hazardous occupation, on condition that he shall furnish such infant with such information relative to the perils of his situation as will enable him to comprehend such dangers, and understand how to avoid them. (*Taylor v. Wootan*, 200.)

9. MINOR SERVANTS.—TO JUSTIFY A MASTER IN THE EMPLOYMENT of an ignorant and inexperienced infant in a hazardous employment, such infant must possess at least sufficient capacity to understand the dangers of the situation and to appreciate the importance of heeding prudent warnings for his own safety. (*Taylor v. Wootan*, 200.)

See Instructions, 3; Police Power; Railroads, 25; Statutes, 11, 12.

MAXIMS.

1. THE MAXIM THAT WHERE THE EQUITIES ARE EQUAL the law will prevail has no application where the equities are unequal by reason of the fact the plaintiff has a prior and superior equity. In such a case, the plaintiff's superior equity will prevail. (*Kern v. Hotelling*, 710.)

2. NEGLIGENCE.—IF ONE OF TWO INNOCENT PARTIES MUST SUFFER, he who by his conduct has enabled a wrongdoer to perpetrate a wrong must bear the loss, rather than the party without fault. (*Union Pac. Ry. Co. v. Johnson*, 540.)

MINES.

See Master and Servant, 4, 5; Railroads, 1, 11, 12; Statutes, 8, 10; Waters, 10.

MINORS.

See Guardian and Ward; Master and Servant, 8, 8, 9.

MISREPRESENTATIONS.

See Evidence, 1; Vendor and Purchaser, 11-16.

MISTAKE.

CONTRACTS MADE UNDER MISTAKE OF FACT.—Where certain facts are assumed by both parties as the basis of a contract, and it subsequently appears such facts did not exist, the contract is inoperative. (*Link v. Smith*, 750.)

See Liens; Public Lands, 8, 9.

MODIFICATION.

See Equity, 4; Judgments, 6.

MONOMANIA.

See Wills, 4.

MORTGAGES.

1. MORTGAGES.—A DEED ABSOLUTE IN FORM is, in fact, a mortgage, when given to secure the payment of money, although the parties may have agreed that, upon default in payment, the deed should become absolute. (State Bank v. Mathews, 565.)

2. MORTGAGES—DELIVERY.—The delivery of an instrument is a question of fact, but this may be inferred from circumstances. The fact that a mortgage has been returned to the mortgagor, for safekeeping, after it has been delivered to the mortgagee, does not defeat its delivery. (Bradtfield v. Cooke, 701.)

3. MORTGAGES—NEGLIGENCE OF MORTGAGEE—WAIVER OF SECURITY.—If a mortgagee, by his own act or neglect, deprives himself of the right to foreclose his mortgage, he at the same time deprives himself of a right to an action on the mortgage note. He cannot, without the consent of the mortgagor, release the mortgage, or waive the security for the purpose of bringing an action upon the note. (Hibernia Sav. etc. Soc. v. Thornton, 52.)

4. MORTGAGES—ASSIGNMENT OF NOTES.—If the holder of notes secured by the same mortgage transfers part of them to one party by general indorsement, and the remainder to another without recourse, all of the notes are entitled to share pro rata in the distribution of the fund realized upon foreclosure; and the fact that some of them were transferred before the others does not imply any agreement that the notes first transferred shall have priority. (State Bank v. Mathews, 565.)

5. MORTGAGES—ASSIGNMENT.—If the grantee in a deed given to secure the payment of notes sells the notes to a third person, and gives him a mortgage on the land named in the deed to secure their payment, the last mortgage constitutes an assignment to such third person of the mortgage deed. (State Bank v. Mathews, 565.)

6. MORTGAGES—ASSIGNMENT OF PART OF NOTES SECURED.—If a mortgage secures several notes, the assignment of one of them is an assignment, pro tanto, of the mortgage, and, in the absence of any stipulation to the contrary, all of the notes so secured share pro rata in the distribution of the fund upon foreclosure. (State Bank v. Mathews, 565.)

7. MORTGAGES—PAYMENT.—Nothing short of actual payment of the debt, or an express release, will operate to discharge a mortgage. (Kern v. Hotelling, 710.)

8. PAYMENT.—THE ACCEPTANCE OF A NEW NOTE AND MORTGAGE in renewal of an old indebtedness, and without any understanding that such indebtedness shall be discharged, is not a payment or discharge of the old indebtedness. (Kern v. Hotelling, 710.)

9. MORTGAGES—FORECLOSURE—DISTRIBUTION OF SURPLUS.—A mortgagee holding two mortgages on the same land against the same mortgagor, and a certificate of purchase under a foreclosure sale of the second mortgage, at which he bid the amount of the principal, interest, and costs, is entitled to a lien for the payment of the amount secured by such mortgage upon the surplus arising from a subsequent sale under the first mortgage, although the

decrees foreclosing the mortgages were obtained at the same time, without provision made in either for the distribution of any surplus arising from a foreclosure sale. (*Clapp v. Hadley*, 308.)

See Equity, 1, 2; Homesteads; Injunctions, 6; Penalties, 2.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—RIGHT TO QUESTION EXISTENCE OF.—A private citizen cannot question the right of a municipal corporation to exercise the authority, powers, and functions of an incorporated city; nor can he, in a private action, question the due annexation to it of territory over which it has assumed to exercise jurisdiction for several years, under proceedings taken to effect such annexation. (*Kuhn v. Port Townsend*, 911.)

2. ESTOPPEL TO DENY MUNICIPAL AUTHORITY.—One who participated in proceedings for the annexation of territory to a municipality, and subsequently recognized the jurisdiction of the municipal authorities, and acquiesced for several years in their claim that such annexation had been effected, is estopped from thereafter questioning it. (*Kuhn v. Port Townsend*, 911.)

3. ANTEDATING MUNICIPAL BONDS to a time anterior to the election which authorized their issue is not such an irregularity as affects their validity, if the object is not to evade the operation of any law, and the result cannot impose a greater or different liability than that sanctioned by the election and other proceedings taken for the issuing of the bonds. (*State v. Moore*, 626.)

4. MUNICIPAL CORPORATIONS — RATIFICATION OF VOID INDEBTEDNESS.—Though the constitution of the state declares that no municipality shall become indebted to an amount exceeding one and a half per cent of its taxable property without the assent of three-fifths of the voters thereof, nor, with such assent, in an amount exceeding five per cent of such value, a statute authorizing the voters to ratify indebtedness which, when created, was void, because in excess of one and a half per cent of the taxable property, is not unconstitutional. Subsequent assent is equivalent to precedent authority. (*West v. Chehalis*, 896.)

5. MUNICIPAL BONDS.—AN ELECTION FOR THE PURPOSE OF RATIFYING WARRANTS ISSUED WITHOUT AUTHORITY RELATES to the date of such issue, and makes such warrants valid, if, at such issue, they, added to the other indebtedness, did not exceed the amount which the municipality was authorized to incur, though, at the date of the election, they, with other existing indebtedness, did exceed such amount. (*West v. Chehalis*, 896.)

6. ELECTRIC LIGHT COMPANIES—SERVITUDE.—A pole used for electric light purposes is within an urban servitude, where it appears that the pole in question is intended to serve public interests. (*Loeber v. Butte etc. Electric Co.*, 468.)

7. ELECTRIC LIGHT COMPANIES—ERECTION OF POLES IN STREET.—If an electric light company, under a contract with a city to light its streets and public buildings, finds it necessary, by reason of the existence of telephone poles, and ordinances requiring it to erect new poles throughout the city, to erect one of its poles at the corner of an alley at the rear of plaintiff's premises, it will not be enjoined from so doing, where it does not seriously interfere with access to such property, or with the air or light to it. Such a use of the streets is not unreasonable, and does not substantially interfere with any right of the plaintiff. (*Loeber v. Butte etc. Electric Co.*, 468.)

8. EMINENT DOMAIN.—THE DAMAGES RECOVERABLE FOR THE OPENING OF A STREET, where they constitute an indivisible claim, include all elements of damage already existing, but do not in-

clude rights of action which are yet inchoate, or damages which may not follow from such opening. (Clark v. Philadelphia, 790.)

9. THE RIGHT TO RECOVER DAMAGES FOR THE GRADING OF A STREET IS NOT WAIVED by disclaiming all damages for the opening of such street, because the right to damages for the change of grade does not accrue until the actual change is made on the ground. (Clark v. Philadelphia, 790.)

10. THE DAMAGES RECOVERABLE BY A PROPERTY OWNER FOR THE GRADING OF A STREET in front of, or running through, his property are not part of the damages recoverable for the opening of the street. Therefore, if the grading occurs as a separate act, so long after the opening of the street that the assessment of damages at the time of the appropriation could not have included those resulting from the grading, the latter may be ascertained and recovered in a second action or proceeding. (Clark v. Philadelphia, 790.)

11. MUNICIPAL CORPORATIONS—DRAINAGE.—Negligence may be imputed to a city, and it may be held liable for damages resulting therefrom, if its officers, acting in good faith, adopt an insufficient or defective plan of drainage. (Beatrice v. Leary, 546.)

12. WATERS, SURFACE.—THE ACTS OF A CITY in cutting ditches along streets and in building dikes, are ministerial acts, for which it may be held liable, in case of negligent omission to provide sufficient outlets for surface water. (Beatrice v. Leary, 546.)

13. WATERS—SURFACE—ESTOPPEL.—Petitioning a city to grade and pave a street does not estop a property owner from claiming damages for the negligent omission of the city to provide suitable outlets for surface water. (Beatrice v. Leary, 546.)

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15. WATERS—SURFACE.—A city has the right to take such steps, and perform such acts, as, in its judgment, are necessary to protect its streets from surface water; but it must perform such work with ordinary care, and, if guilty of negligence which is the natural and proximate cause of injury to an adjoining lotowner, it is liable therefor. (Beatrice v. Leary, 546.)

See Nuisance, 1; Taxes, 1.

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IDEM SONANS.—If two names may be sounded alike without doing violence to the power of the letters found in the variant orthography, the variance is immaterial. Therefore, an indictment for stealing a watch from Edmond Bolden may be supported by evidence of its theft from Ed. Bolen. (Pittanogle v. Commonwealth, 867.)

NEGLIGENCE.

1. NEGLIGENCE — WHEN QUESTION OF LAW. — When the facts in a negligence case are specially found, either by the court or the jury, it is then for the court to decide whether such facts amount, *prima facie*, to negligence. (Brummit v. Furness, 215.)

2. NEGLIGENCE, CONTRIBUTORY, BREAKING OF DAM | DAMAGES.—Though one lives on a stream below a dangerous dam, and has knowledge of its condition, his failure to institute statutory proceedings to have it judicially examined, and made secure, or abated as a

aidance, is not contributory negligence, and does not defeat his right to recover damages resulting from an subsequent breaking. (*Holmesback v. Dingwell*, 512.)

3. NEGLIGENCE CONTRIBUTORY.—THE TWO ESSENTIAL ELEMENTS in contributory negligence are a want of ordinary care on the part of the plaintiff and a causal connection between that and the injury complained of: that is, the plaintiff being such a negligent person cannot recover damages for an injury he has sustained if the injury could have been avoided by the exercise of ordinary care on his part. (*Holmesback v. Dingwell*, 512.)

See *Husband and Wife*, 7, 8; *Landowners*; *Telegraph Companies*.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—NOTE OR WILL.—A written instrument in which the maker expresses a desire "to advance the cause of missions, and to induce others to contribute to that purpose," and promises absolutely and unconditionally to pay a certain sum of money, the payment to be made out of his estate one month after his death, is a promissory note, and not a will, and, having a good and valid consideration, it may be enforced by suit. (*Garrigus v. Home etc. Missionary Soc.*, 262.)

2. NEGOTIABLE INSTRUMENTS, THOUGH FOUNDED UPON AN ILLEGAL CONSIDERATION, are enforceable by bona fide holders for value. (*Lynchburg Nat. Bank v. Scott*, 880.)

3. NEGOTIABLE INSTRUMENTS—REASONABLE ATTORNEY FEE.—If a note provides for a reasonable attorney fee, in case of suit, and there is an issue as to what is such a fee, the statutory attorney fee only will be allowed, unless some evidence is taken as to what constitutes a reasonable attorney fee. (*Bradfield v. Cooke*, 701.)

4. DELIVERY.—The payee's possession of a promissory note raises a presumption of delivery. (*Garrigus v. Home etc. Missionary Soc.*, 262.)

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6. NEGOTIABLE INSTRUMENTS.—AN ACCOMMODATION INDORSER cannot recover from the maker until he has paid and satisfied the demands of the indorsee. (*Sheahan v. Davis*, 722.)

7. NEGOTIABLE INSTRUMENTS—LIABILITY OF MAKER TO ACCOMMODATION INDORSER.—The maker of a negotiable promissory note is liable to one who, without his request, indorses it for the accommodation of another, if such indorser is compelled to pay it upon default of the maker, although the indorser, after his indorsement, discovered that there was, originally, a want, or failure, of consideration for the note. (*Sheahan v. Davis*, 722.)

8. NEGOTIABLE INSTRUMENTS—TITLE OF INDORSER—RELATION.—If an indorsement has been made in good faith, and the indorser has been compelled to pay a negotiable promissory note at or after its maturity, his title relates back to the date of his indorsement, and he thus becomes the lawful holder for value and without notice, although after his indorsement he may learn of the want or failure of the original consideration. (*Sheahan v. Davis*, 722.)

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See Checks; Evidence, 11; Mortgages, 3-5; Usury.

NEWSPAPERS.

See Contempt.

NEW TRIAL.

NEW TRIAL.—Except in cases where no remedy can be had by appeal, it is bad practice to resort to motions for a new trial, under the provisions of chapter 51 of the Public Acts of Connecticut of 1893, which involve large expense to the state from the cost of printing the entire evidence, when the real grievance arises from the instructions which the jury received from the court. No verdict will, therefore, be treated, under the statute, as against the evidence in the cause, which is warranted, on the evidence, by the terms of the charge, however erroneous it may have been. (*Ward v. Metropolitan etc. Ins. Co.*, 80.)

NONUSER.

See *Waters*, 18.

NOTARIES PUBLIC.

See *Affidavits*, 2; *Evidence*, 2.

NOTICE.

NOTICE.—MEANS OF KNOWLEDGE, with the duty of using them, are, in equity, equivalent to notice. (*Carneal v. Lynch*, 819.)
See *Banks*; *Corporations*, 10; *Insurance*, 14, 15; *Trusts*, 4; *Vendor and Purchaser*, 1, 3, 5-7.

NUISANCE.

1. A NUISANCE CANNOT BE AUTHORIZED BY A CONTRACT between a municipality and a cemetery association, to the injury of a third person. (*Barrett v. Mt. Greenwood Cemetery Ass'n.* 168.)

2. NUISANCES—CUMULATIVE REMEDIES.—The equitable remedy to prevent the creation or continuation of a nuisance is not taken away by a statute giving a remedy by indictment. (*Barrett v. Mt. Greenwood Cemetery Assn.*, 168.)

See *Waters*, 23.

OATH.

See *Definitions*; *Elections*, 4.

OBSTRUCTIONS.

See *Highways*.

OFFICERS.

1. OFFICERS, DISCRETION OF, IN AWARDING STATE CONTRACTS.—Under a statute directing the state furnishing board to let to the "lowest responsible bidder" a contract for the publication and annotation of the state codes, the contract not to exceed a certain amount, the board, in awarding the contract, has discretionary powers, and it is its duty to wisely and honestly determine the question of responsibility. (*State v. Rickards*, 476.)

2. STATE CONTRACTS—LOWEST "RESPONSIBLE" BIDDER. The term "responsible," used in a statutory direction to state officers to let a state contract to the "lowest responsible bidder," means something more than pecuniary ability. It includes judgment, skill, ability, capacity, and integrity. Hence, officers intrusted with the duty of awarding a state contract to the "lowest responsible bidder" must exercise official discretion in determining the question, and cannot be compelled, by mandamus, to award such a contract to a particular bidder merely upon

his assertions of competency and skill, and because he has offered the lowest bid, and tendered a sufficient bond, especially where his facilities for complying with the contract appear to be inadequate. (*State v. Richards*, 476.)

3. IF A CITY TREASURER BECOMES A BORROWER OF THE FUNDS in his official custody, and pays interest to himself as such officer, the sureties on his official bond are answerable for such interest, if he afterward misappropriates it, or it is by any other cause lost or not properly accounted for. (*Wilkes-Barre v. Rockafellow*, 795.)

4. IF A CITY TREASURER BECOMES A BORROWER OF THE MONEYS INTRUSTED TO HIS CARE, by the loan to him thereof by the sanction of the proper municipal authorities, the sureties on his official bonds are not answerable for the repayment thereof, for the reason that it is not an official duty arising from his being treasurer, but merely an obligation resulting from his having become a debtor of the municipality. Nor need the sureties prove that the action of the municipal authorities was regular, or that all the steps which ought to have been taken before making the loan were taken. It is sufficient that, without the knowledge of the sureties, their principal had been turned from a mere custodian of public moneys into a borrower of them by the action of the municipal officers, and the money subjected to all the risks of loss incident to its being mingled with the funds of the borrower, and used in his private business. (*Wilkes-Barre v. Rockafellow*, 795.)

5. OFFICIAL BONDS.—THE LIABILITY OF BOTH PRINCIPAL AND SURETIES on an official bond must be measured by the terms of the instrument. These must receive a reasonable construction, and this requires that they shall not be extended so as to cover any violation except of official duties. Therefore, sureties are not answerable for extra-official acts or undertakings of their principal. (*Wilkes-Barre v. Rockafellow*, 795.)

6. THE SURETIES OF A CITY TREASURER ARE NOT ANSWERABLE FOR INTEREST on a balance in his hands in favor of the municipality, and upon which he agreed to pay interest. Such an agreement is against public policy. (*Wilkes-Barre v. Rockafellow*, 795.)

7. ENTRIES ON PUBLIC BOOKS—BONDS.—While the entries made by a city treasurer in his books are prima facie evidence against his sureties, they should be permitted to prove that the items, or some of them, have been erroneously entered, that their principal was mistaken in his view of his own liability, or was disposed, unfairly, to make them responsible for sums of money for which no recovery could otherwise be had against them. (*Wilkes-Barre v. Rockafellow*, 795.)

8. OFFICIAL ACTS, WHAT ARE NOT.—If an officer having no process in his hands does an act which he has no right to do, he is not acting by virtue of his office, and therefore the sureties on his official bond are not answerable for such act. (*Marquis v. Willard*, 906.)

9. THE SURETIES OF A CHIEF OF POLICE ARE NOT ANSWERABLE for his receiving and detaining persons in prison, when he acts without warrant or other process and without authority of law. His act, while it may have been done under color of his office, was not by virtue thereof, and is not an official act. (*Marquis v. Willard*, 906.)

See Arrest; Banks; Corporations, 10, 11, 14-17; Evidence, 7, 8; Execution, 10-12; Mandamus.

ORIGINAL PACKAGE.

See Interstate Commerce, 1, 2.

PARENT AND CHILD.

1. **PARENT AND CHILD.**—A man who marries the mother of a bastard child does not become its stepfather. (*Thornburg v. American Strawboard Co.*, 334.)

2. **PARENT AND CHILD—DEATH OF BASTARD—RIGHT TO RECOVER.**—A man who marries the mother of a bastard child, and receives it into his home as a member of his family, cannot recover for its death caused by the wrongful act of another. (*Thornburg v. American Strawboard Co.*, 334.)

3. **PARENT AND CHILD—DEATH OF BASTARD—RIGHT TO RECOVER.**—A statute giving the right to parents to recover for the wrongful death of a minor child does not include a man who marries the mother of a bastard child. (*Thornburg v. American Strawboard Co.*, 334.)

4. **PARENT AND CHILD.—STATUTES GIVING TO PARENTS** the right to sue for the wrongful death of a minor child are in derogation of the common law, and must be strictly construed. (*Thornburg v. American Strawboard Co.*, 334.)

PAROL.

See Evidence, 10-13.

PARTIAL PAYMENTS.

See Vendor and Purchaser, 10.

PARTIES.

1. **PARTIES SUBSTITUTED.—TO BRING IN A PERSONAL REPRESENTATIVE OF A DECEASED PARTY**, where the original defendant in the action dies previous to the service of a summons upon him, or his appearance of record, the better practice is to take an order continuing the case against those who have succeeded to the interest of the deceased party, to file then a supplemental complaint showing the facts, and thereupon issue an alias summons containing the title of the action after substitution is made. A service of such a summons, with a copy of the complaint, gives jurisdiction of the substituted party. (*White v. Johnson*, 726.)

2. **PARTIES.—THE PROCEDURE FOR BRINGING IN NEW PARTIES**, after the court has made an order to that effect, appears to be to amend the complaint by inserting therein such allegations as are necessary to make the persons omitted parties to the action, to insert their names in the summons, and, if they do not enter an appearance, to serve them with the amended summons and complaint, giving them the usual time allowed by statute to original parties in which to answer. (*White v. Johnson*, 726.)

See Attachment, 2.

PARTITION.

PARTITION.—A LIFE TENANT OF ONE MOIETY OF LAND can maintain a suit for partition against the remaindermen of that moiety, whether in esse or not, and the owners in fee simple of the other moiety. (*Carneal v. Lynch*, 819.)

PARTNERSHIP.

1. **PARTNERSHIP, TRADING, WHAT IS NOT.**—A partnership for the purpose of carrying on the business of general contractors and builders is not a general or trading partnership, nor does the fact that the partnership furnished a limited amount of goods to the men working

for it, and deducted the price thereof from their wages, convert it into a trading partnership. (*Snively v. Matheson*, 877.)

2. PARTNERSHIP, AUTHORITY OF PARTNER TO BIND FIRM. The presumption in a nontrading partnership is, that neither partner has authority to bind the firm by a promissory note. This presumption may be rebutted only by proving that such authority was given by the partnership articles, or had been specifically conferred, or that it had been the custom of the partnership to recognize the right of a partner to make such notes to such an extent as would give innocent dealers a right to rely upon the custom. (*Snively v. Matheson*, 877.)

3. PARTNERSHIP.—EACH PARTNER SHOULD CONSULT THE OTHER in every important contingency, and if, because of his failure to do so, a loss is suffered, he must bear the whole of it; so held where a partner, believing the title to real property to be defective, purchased and paid for a conveyance, when inquiry of his partner would have revealed that the title was perfect. (*Yorks v. Tozer*, 395.)

4. PARTNERSHIP—PLEADING—DENIAL OF THE INTEREST OF ONE PARTNER.—In an action against a partnership to foreclose a mortgage purporting to be executed upon its property, and where the articles of copartnership declare that each partner shall have such interest in the partnership property and funds, evidence is not admissible to prove that one of the partners had no interest in the property mortgaged. (*Snively v. Matheson*, 877.)

PARTY WALLS.

PARTY WALLS—HOW CREATED.—In the absence of some statute, a strict party wall can exist only by prescription, or by contract, express or implied. (*Whiting v. Gaylord*, 87.)

PAYMENT.

PAYMENT.—Acceptance of a note for the amount of a debt is not a payment thereof unless the parties expressly so agree. (*Johnston v. Barrills*, 717.)

See Mortgages, 7, 8.

PENALTIES.

1. PENALTY, WHAT IS.—Where the payment of a smaller sum is secured by an agreement to pay a larger, the latter will be held to be a penalty, and not liquidated damages. (*Krutz v. Robbins*, 871.)

2. AGREEMENT TO PAY INCREASED INTEREST IN THE EVENT OF DEFAULT.—A stipulation in a mortgage that, if default is made in the payment of interest or principal at the times designated, the mortgagors will pay interest on the principal at the rate of twelve per cent per annum from the date of the note until payment is made, the rate of interest in the absence of such default being only seven per cent per annum, is a stipulation for a penalty, and, therefore, not enforceable. (*Krutz v. Robbins*, 871.)

3. PENALTIES.—An action to recover a penalty from a railroad company, cannot be brought or maintained by an informer, under a statute simply imposing such penalty on the company, for failing to ring a bell or sound a whistle at a crossing, half of the penalty to go to the informer, and half to the state. (*Omaha etc. Ry. Co. v. Hale*, 554.)

4. PENALTIES.—AN INFORMER CANNOT bring in his own name, nor control when brought, an action to recover a statutory penalty, unless authorized to do so by statute. (*Omaha etc. Ry. Co. v. Hale*, 554.)

See Equity, 2.

PERJURY.

See Judgments, 7.

PHOTOGRAPHS.

See Indecency.

PHYSICIANS AND SURGEONS.

See Railroads, 26, 27.

PICTURES.

See Indecency.

PLEADING.

1. PLEADING.—A COMPLAINT MUST BE CONSTRUED upon the theory most clearly outlined by the facts stated therein. (Pittsburgh etc. R. R. Co. v. Sullivan, 313.)

2. PLEADING. — INDEFINITENESS OF COMPLAINT IS CURED by explicit findings as to general allegations, in a special verdict. (Chicago etc. R. R. Co. v. Wolcott, 320.)

3. PLEADING—PROLIXITY OF DETAILS.—If a subject comprehends multiplicity of matter, and a great variety of facts, general pleading is allowed, in order to avoid prolixity. (Chicago etc. R. R. Co. v. Wolcott, 320.)

4. PLEADING.—IN ACTIONS FOR MONEY HAD AND RECEIVED by the defendant for the use of plaintiff, a bill of particulars is not required. If any uncertainty exists, it can be remedied by motion to make the complaint more specific. (McCoy v. Oldham, 208.)

5. A DEMURRER DOES NOT ADMIT THE CORRECTNESS OF CONCLUSIONS of law stated in the pleading to which it is interposed. (American Water Works Co. v. State, 610.)

6. PRACTICE.—THE DISMISSAL OF A BILL AS TO PART OF THE DEFENDANTS by consent will not prevent the court from granting relief against other defendants, not so connected with those dismissed that the latter continue to be necessary parties to a final decree. (Green v. Hedenberg, 178.)

7. PLEADINGS—AMENDMENTS AND ADDITIONS TO.—It is very largely within the discretion of the trial court to permit the filing of additional paragraphs of pleadings and amendments after the issues are closed; and a ruling allowing this to be done is not ground for a reversal of judgment, unless the appellant shows affirmatively that he was prejudiced by it. (Adams v. Main, 266.)

See Carriers, 8.

POLES.

See Municipal Corporations, 6, 7.

POLICE POWER.

POLICE POWER.—The power to prohibit an employer from exercising his constitutional right to insist that his employees shall not belong to a trade or labor union is not within the police power of the state. (State v. Julow, 443.)

POLLUTIONS.

See Injunctions, 5; Waters, 22, 23.

PREFERENCES.

See Assignments for the Benefit of Creditors, 1; Executions, 5-7.

PRESCRIPTION.

See Easements; Party Walls; Waters, 9, 10.

PRESIDENT.

See Corporations, 14-17.

PRESUMPTIONS.

See Definitions; Evidence, 4-9; Insurance, 28.

PRINCIPAL AND AGENT.

See Agency.

PRINCIPAL AND SURETY.

See Suretyship.

PROBABLE CAUSE.

See Arrest, 4-6.

PROCESS.

1. PROCESS—SUMMONS IS "ISSUED," WHEN.—Under a statute requiring that a summons shall be served by the sheriff, it is "issued" when it has been signed by the plaintiff or his attorney, and deposited with the sheriff for service. Until then it has no vitality for any purpose. (White v. Johnson, 726.)

2. PROCESS—SERVICE OF SUMMONS.—Being "duly served with summons" implies that the defendant has been served with summons in the manner directed by law, in every particular, requiring him to appear in the court of the county where the judgment is taken. (White v. Johnson, 726.)

3. ATTACHMENT—JURISDICTION AS TO SUBSTITUTED PARTIES—PERSONAL JUDGMENT.—No personal judgment can be rendered without service of summons on the defendant individually. By the allowance of a provisional remedy, such as the issuance of a writ of attachment, a court acquires jurisdiction to make substitution, and to order the action to be continued in the name of the personal representative of a deceased party, but the court, in such a case, is not invested with as full power to control "all the subsequent proceedings" as where there has been a service of summons. (White v. Johnson, 726.)

4. PROCESS—SERVICE OF SUMMONS ON SUBSTITUTED PARTY—JUDGMENT BY DEFAULT.—If the defendant in an action dies after the issuance of the summons, but before it is served on him, and an order is made substituting his executrix, and continuing the action in her name, and thereafter the summons, entitled in the original action, and directed to the deceased, is served on the executrix, together with a copy of the original complaint and of the order requiring her to appear and plead, such service does not, under a statute providing that "the summons shall contain the names of the parties to the action, and the title thereof," and shall be "directed to the defendant," give the court any jurisdiction to render a judgment by default against her as executrix, or to render a judgment binding upon property attached in the action. (White v. Johnson, 726.)

5. VOID JUDGMENT.—If, in an action by the state to foreclose a certificate of purchase of state land, the name of the holder of the certificate is alleged to be unknown, and he is sued under a fictitious name, the provisions of the statute for service of summons by posting must be substantially complied with, and if the return indorsed on the summons, and the record fail to show such compliance, the defects cannot be supplied by presumption, and a judgment by default foreclosing the certificate upon such return is void for want of jurisdiction. (*Pioneer Land Co. v. Maddux*, 67.)

PUBLICATION.

See Judgments, 2, 3.

PUBLIC LANDS.

1. PUBLIC LANDS—TITLE OF HOLDER OF CERTIFICATE OF PURCHASE.—The holder of a certificate of purchase of state land who has fully paid the purchase price thereof, has a vested right to a patent and sufficient title to support an action to quiet title against a subsequent patentee from the state. (*Pioneer Land Co. v. Maddux*, 67.)

2. PUBLIC LANDS—CERTIFICATE OF PURCHASE—RIGHTS OF HOLDER UPON PAYMENT.—The holder of a certificate of purchase of state land, who has fully paid the purchase price thereof, is the equitable owner of the land, with a vested right to a patent from the state. The state is then merely a naked trustee of the legal title, which it is bound to convey to such equitable owner on demand, and it has no right thereafter to sell and convey the land to another, even though it has obtained a void judgment foreclosing the certificate of purchase of such owner before he has fully paid the purchase price. (*Pioneer Land Co. v. Maddux*, 67.)

3. PUBLIC LANDS—CANCELLATION OF ENTRIES.—The commissioner of the general land-office has power, generally, to cancel entries for public lands. Such power is not arbitrary or unlimited, and must be exercised according to law. (*Parsons v. Venzke*, 669.)

4. PUBLIC LANDS—CANCELLATION OF ENTRY—RIGHTS OF BONA FIDE PURCHASER.—The power of the commissioner of the general land-office to cancel an entry for public land is not affected by the transfer or mortgage of the land to one who, in good faith, parts with value, without knowledge of the facts causing the cancellation of the entry. (*Parsons v. Venzke*, 669.)

5. PUBLIC LANDS—CANCELLATION OF ENTRY—NOTICE OF HEARING.—Failure to require the filing of an affidavit that the party to be served with notice of the cancellation of an entry for public lands cannot be personally served, is not fatal to the power of the land department to act, upon publication of such notice, without personal service, provided such party has knowledge of the hearing and an opportunity to be heard. (*Parsons v. Venzke*, 669.)

6. PUBLIC LANDS—EX PARTE CANCELLATION OF ENTRY.—The fact that the proceedings for the cancellation of an entry for public land have been ex parte, does not entitle the entryman to relief, unless he was entitled to a patent at the time of the cancellation of the entry. (*Parsons v. Venzke*, 669.)

7. PUBLIC LAND—CANCELLATION OF ENTRY—PRESUMPTION.—The courts presume that the commissioner of the general land-office, in canceling an entry for public land in an ex parte proceeding, has properly exercised his power, and the entryman must prove the contrary, and that he has acted in good faith and fully complied with the law, to entitle him to the patent to the land. (*Parsons v. Venzke*, 669.)

8. PUBLIC LANDS—CORRECTION OF MISTAKE IN CANCELLATION OF ENTRY.—If the commissioner of the general land-office has been induced, by fraudulent misrepresentations, or by material mistake of fact, to cancel an entry for public lands, or if he has exercised the power of cancellation in violation or in disregard of law, the results so produced may be so modified by courts of equity that those entitled to the titles to the lands may ultimately obtain them. (*Parsons v. Venzke*, 669.)

9. PUBLIC LANDS—CORRECTION OF MISTAKE IN CANCELLATION OF ENTRY.—If the commissioner of the general land-office cancels an entry for public lands under a misconception of the law, the courts may rectify the error, and give the land to the one who would have received the patent if the mistake had not been committed. (*Parsons v. Venzke*, 669.)

10. PUBLIC LANDS.—DECISIONS OF THE GENERAL LAND DEPARTMENT on questions of fact involved in the cancellation of entries for public lands are binding on the courts, if the parties have been heard, or have had an opportunity to be heard. (*Parsons v. Venzke*, 669.)

11. PUBLIC LANDS.—COURTS DO NOT DISTURB THE DECISIONS OF THE COMMISSIONER of the general land-office in canceling an entry for public land on account of errors relating to the burden of proof, the competency or weight of evidence, when full opportunity to be heard has been given the entryman. (*Parsons v. Venzke*, 669.)

See Process, 5.

PUBLIC POLIOY.

See Contracts, 3; Landlord and Tenant, 1.

PUBLIC USE.

See Eminent Domain.

PURCHASE MONEY.

See Homesteads, 5, 6.

RAILROADS.

1. RAILROADS—MINING—PUBLIC USE.—In a state where mining is the dominant industry, the magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad to construct lateral branches, tracks, and spurs to mines and mining works, as public uses, under the law of eminent domain. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

2. RAILROADS—"MORE NECESSARY PUBLIC USE."—Under an express constitutional command that all railroads shall be public highways and common carriers, a railroad built by a private corporation, with its main line and branches, or spurs, run within convenient contiguity of private mines or orehouses, is a public use, and may exercise the right of eminent domain for a use authorized by law, when the ground taken is necessary to such use, and where, if the ground is already taken, the public use to which it is to be applied is a "more necessary public use." (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

3. EMINENT DOMAIN—PUBLIC USE—NECESSITY, WHEN SHOWN.—One railroad may exercise the right of eminent domain as to part of the right of way, not in actual use, of another railroad, when there is a necessity therefor; and such necessity is shown where the right of way of the existing road is twenty-five feet on each side of the center

of its track, which runs along the side of a mountain, but which is only graded a little more than necessary for the actual space occupied by its roadbed; and another road, seeking the same objective point for the purpose of hauling ore from mines on the mountain asks to have condemned the adjacent portion of the right of way on the upper hillside, which is not used, and cannot be used, without heavy excavation work; where, by the abrupt rise in the mountain, and its rocky character, it is necessary for the one road to cross divers spurs of the other, which necessity requires both roads to be on the same level, and which can be obviated only by requiring the incoming road to go under the other, which would be unreasonable and impracticable, or to construct its road high enough to go overhead, which would require it to run into the mountain, at enormous expense, and switch back, in order to reach the objective points of the two roads; and where, by running higher up the mountain, the route would materially interfere with the operation of mines, while, by going upon the existing right of way, the incoming road would merely widen the cuts existing, causing no material damage, and leave a space of from seventeen to twenty-two feet between the centers of the tracks. It is no tenable objection to such condemnation that the occupancy of the incoming road would make it more difficult for the existing road to throw out switches or sidetracks above it, or make it more difficult for it to handle ties, there being a distance of twenty-two feet between the centers of the tracks, enough room for another track, and, if the elevation of the incoming road is too high to prevent the existing road from crossing it at right angles with such switches or sidetrack, a spur can be run, at any distance, in order to attain the proper elevation. Neither can it be successfully urged that the right of way taken by the incoming road is necessary in case of future double tracks or sidings, as these needs are mere future possibilities, not based on reasonably apparent traffic needs. Nor, in view of the express provision of the constitution giving one railroad the right to cross another, will the fact that the existing road may be inconvenienced in the operation of its trains at the various crossings proposed, constitute any objection to the occupancy of the incoming road. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

4. EMINENT DOMAIN—RAILWAY CROSSINGS—DIFFERENCE OF GRADES.—If one railroad seeks to cross another, there being a slight difference of elevation of grades of the two roads at the crossing of a spur of the existing road, and the only practicable way of crossing is to raise the grade of the spur from the switch to the point of intersection, the court will order the crossing to be so made, at the expense of the incoming road. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

5. EMINENT DOMAIN—RAILWAY CROSSINGS—"HUMP."—If one railroad seeks to cross the spur of another railroad on a mountainside without raising the grade of the latter's track, and finds it necessary to construct a reverse grade, which makes a "hump," that is, an uphill and a downhill grade, which may be dangerous and liable to obstruct the track of the existing road with wreckage in case the trains of the incoming road break in two at that point, the court will not, where the evidence of skilled engineers as to the feasibility of the crossing is conflicting, disturb the crossing as so constructed, as the court cannot determine the probable effect of the "hump." (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

6. EMINENT DOMAIN—RAILWAY CROSSINGS—DAMAGES. In condemnation proceedings by one railroad company to obtain parts of the right of way of another, the question of damages for crossings is properly referred to commissioners, where the statute authorizes it. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

7. EMINENT DOMAIN—RAILWAY CROSSINGS—CONDITIONS. If one railroad seeks to condemn a part of the right of way of another,

used for hauling ore from certain mines, and a spur of the existing road, used for a particular mine, is on the north side of its track, while the mine is on the south side, and the grade of the plaintiff's track is above the grade of the spur at the point of crossing, the court will, if it would be more convenient for the existing road to have the spur on the south side of its main track, order the incoming road, at its own expense, to rebuild the spur already constructed, upon the south side of the existing main track, and provide suitable approaches to it for teams. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

8. RAILROADS — CROSSINGS — LONGITUDINAL TAKING. — Under a statute providing that all rights of way shall be subject to be connected with, crossed, or intersected by any right of way, and that they shall also be subject to a limited use in common with the owner thereof when necessary, it seems that the right of a railroad to condemn a portion of the right of way of another railroad, not in actual use, is not limited to crossings or intersections only, but extends to a longitudinal taking. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

9. EMINENT DOMAIN — CROSSINGS — WATCHMEN. — If the employment of a watchman is rendered necessary by one railroad crossing another, the former should be allowed to select the watchman, but should be required to bear his expense. (*Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 508.)

10. RAILWAY CORPORATIONS — AGREEMENT TO GIVE TRAFFIC TO, AND NOT TO AID COMPETING LINES. — An agreement between parties to a contract, one being a mining, and the other a railway, corporation, that the former will give the latter all its traffic, and will not aid or encourage in any manner in the construction of competitive lines of railway, will be enforced in equity so far as it relates to the traffic, but in other respects, neither the mining corporation, nor its stockholders or managers, will be denied the right to promote, or otherwise encourage, competing lines of railway. (*Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co.*, 807.)

11. RAILWAY CORPORATIONS, AGREEMENT TO GIVE EXCLUSIVE BUSINESS TO. — An agreement, upon a valuable consideration, that a mining corporation will give all traffic to and from its mines and furnaces to a railway corporation, is not against public policy, and may be enforced in equity, where the railway, on its part, agrees to carry such traffic for fair and reasonable charges, and, in the event of any disagreement as to what charges are reasonable, to submit that question to arbitration. (*Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co.*, 807.)

12. RAILWAY, CONSIDERATION OF A CONTRACT TO GIVE BUSINESS TO. — If, in consideration that a railway corporation shall subscribe for a specified amount of the bonds of a mining corporation, the latter agrees that it will give to the railway corporation all the traffic to and from its ore land and furnaces, which traffic the railway corporation agrees to carry for fair and reasonable charges, such agreement, upon the part of the mining corporation, is supported by valuable and sufficient consideration. (*Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co.*, 807.)

13. CARRIERS — TERMINATION OF LIABILITY. — A railway corporation, leaving a portable package in one of its cars, instead of putting it in the freightroom, is answerable for the loss thereof by theft, though, had the consignee called for it, it would have been delivered to him two days previous to its loss. In the case of portable packages, a carrier cannot terminate its liability without removing them from the car to its freighthouse. (*Kirk v. Chicago etc. Ry. Co.*, 397.)

14. CARRIERS — FAILURE TO FURNISH TRANSPORTATION — ASSIGNMENT OF CLAIM FOR DAMAGES. — A claim for damages

against a railroad company, arising under a statute requiring it to furnish sufficient accommodations for the transportation of all property offered to it for transportation, may be assigned. (Chicago etc. R. R. Co. v. Wolcott, 320.)

15. **WHEN A RAILROAD COMPANY HOLDS ITSELF OUT AS A CARRIER OF LIVESTOCK**, the law imposes upon it the duty to provide suitable and safe facilities, such as yards or pens, both at the place of shipment and the place of destination, for receiving and discharging the livestock offered it for shipment over its road. (Norfolk etc. R. R. Co. v. Harman, 855.)

16. **A CARRIER OF LIVESTOCK** is not exempt from liability for injuries suffered by its failing to furnish and maintain suitable facilities for receiving such stock, by a provision in the contract of shipment declaring that it is not to be liable for any injury of the stock until it is loaded on the car, and the car duly fastened and secured by the conductor. It cannot, by contract, exempt itself from liability for negligence. (Norfolk etc. R. R. Co. v. Harman, 855.)

17. **RAILROADS—RULES AND REGULATIONS.**—While a railroad company may adopt reasonable rules and regulations in the dispatch of its business in carrying passengers, and insist upon a compliance therewith upon the part of all who seek transportation, it is bound to afford reasonable facilities to enable a passenger to comply with its rules and regulations. (Chicago etc. R. R. Co. v. Graham, 256.)

18. **BUYING TICKETS ABOARD THE TRAIN.**—A railroad company may charge one who pays his fare on the train a higher rate of fare than one who buys a ticket before getting on the cars, if it extends ample facilities to all travelers who desire to procure tickets. (Chicago etc. R. R. Co. v. Graham, 256.)

19. **EJECTING PASSENGER ON SUNDAY.**—The fact that a passenger traveling on a Sunday excursion train is wrongfully ejected on that day from the train, does not bar his right to recover damages for injuries sustained thereby. (Chicago etc. R. R. Co. v. Graham, 256.)

20. **EXCURSION TRAINS AT REDUCED RATES.**—A railroad company may run an excursion train at reduced rates, require passengers to purchase tickets as a condition to obtaining the benefit of such rates, and enforce the rule against all who, by their own fault, fail to comply with it. (Chicago etc. R. R. Co. v. Graham, 256.)

21. **RIGHT TO PAY EXCURSION TICKET FARE ON TRAIN.**—If a passenger on a railroad excursion train, through the fault of the company, has been unable to procure a ticket before entering the train, he may ride on such train, and, upon a tender of the excursion ticket fare, he is entitled to all the rights and privileges that a ticket would afford to him. (Chicago etc. R. R. Co. v. Graham, 256.)

22. **PAYMENT OF EXCESSIVE FARE ON EXCURSION TRAIN.**—One is under no obligation to purchase, even for a trifle, what is already his own. Therefore, a passenger on an excursion train, running at reduced rates, who has, through the fault of the company, been unable to secure an excursion ticket, is under no obligation to pay the full or excessive rate of fare demanded by the conductor on the train, in order to prevent his being ejected from the train and thus lessen his damages. (Chicago etc. R. R. Co. v. Graham, 256.)

23. **EJECTING PASSENGER—ACTION FOR VIOLATION OF PERSONAL RIGHT.**—A cause of action for ejecting a passenger

from an excursion train after tender of the excursion rate is not for a breach of the contract to carry, but for the violation of a personal right assured by the law. (Chicago etc. R. R. Co. v. Graham, 256.)

24. EXCURSION TRAIN—LIABILITY FOR EJECTING PASSENGER UNABLE TO PROCURE A TICKET.—When a railroad company invites the public to take passage upon a special train at a certain station, at excursion rates, passengers have a right to expect that reasonable accommodations will be furnished there, or on the train, to obtain tickets; and if the company has no ticket office, or agent, to sell tickets at that station, it cannot insist that all who board the train shall first purchase excursion tickets. Under such circumstances, if it ejects a passenger who tenders the excursion rate on the train, it is liable in tort for the damages inflicted. (Chicago etc. R.R. Co. v. Graham, 256.)

25. RAILROADS.—A FOREMAN OF A GANG OF MEN employed by a railroad company in unloading dirt from cars, who is under the immediate and direct control of a division roadmaster, is only a fellow-servant with each of the other members of the gang, whether he is authorized to hire and discharge or not. Therefore, none of them can recover of the common master for the foreman's negligence. (Schroeder v. Flint etc. R. R. Co., 354.)

26. RAILROADS—DUTY TO FURNISH SURGEON AND LIABILITY FOR HIS ACTS.—A railroad company is under no legal obligation to provide surgical aid for its injured employees. If it does so, voluntarily and gratuitously, its liability cannot be extended beyond its negligence, if any, in the selection of a surgeon. (Pittsburgh etc. R. R. Co. v. Sullivan, 313.)

27. RAILROADS—LIABILITY FOR SURGEON'S NEGLIGENCE. A railroad, voluntarily assuming to employ medical aid for its injured employes, is bound only to exercise reasonable care and diligence to employ a competent physician or surgeon, but is not required to select one of the highest skill or longest experience. If it exercises this required care and diligence, its duty terminates; and it is not liable for the subsequent malpractice or wrongs of such physician or surgeon, committed in or about the treatment of the servant. (Pittsburgh etc. R. R. Co. v. Sullivan, 313.)

28. RAILROAD COMPANIES—IMPLIED INVITATION.—Workmen who, for the purposes of their employment, use a planked railroad crossing, which has been maintained for years for the use of a manufacturing company having shops extending along either side of the railroad track, are not mere licensees, but are there upon the implied invitation of the railroad company. (Pomponio v. New York etc. R. R. Co., 124.)

29. RAILROAD COMPANIES — LICENSEES AND PERSONS INVITED.—A railroad company, which has for years maintained a planked crossing upon its tracks for the use of a manufacturing company having shops extending along either side of the railroad, is liable for its negligent act in switching its cars at the crossing, whereby a person, going to his work at one of the shops, after the noon intermission, is, without fault upon his part, struck and killed, whether he is upon the crossing as a licensee, or by implied invitation. (Pomponio v. New York etc. R. R. Co., 124.)

30. RAILROADS—FENCING AT STATIONS.—A railroad company is not required to fence its track at any of its stations. (Stewart v. Pennsylvania Co., 231.)

31. RAILROADS—FENCING AT STATIONS—DEATH OF ANIMAL.—A railroad company is not liable for killing an animal which wanders upon the track at a station. (Stewart v. Pennsylvania Co., 231.)

32. NEGLIGENCE—PROXIMATE CAUSE.—In an action to recover for personal injury sustained while alighting from a street-car, and alleged to have been caused by the negligence of the defendant in suddenly starting the car while the injured passenger was standing on the steps, and in permitting a hook to hang near the steps of the car, thereby catching and dragging such passenger, the defendant can exonerate himself from liability only by proof of the absence of negligence on his part, and that the hook being recently displaced by another passenger was the sole and proximate cause of the accident. (*Bowdle v. Detroit etc. R. R. Co.*, 366.)

See Agency, 1; Appeal, 6; Penalties, 3; Specific Performance.

RATIFICATION.

See Municipal Corporations, 4, 5.

REAL PROPERTY.

1. A NAKED POSSIBILITY OF REVERTER is incapable of alienation or devise, but descends to the heirs. Therefore, if real property is conveyed to a corporation whose charter subsequently expires or is forfeited, although the property reverts to the grantor and his heirs, such reverter cannot operate to the advantage of his assignees or devisees. (*Presbyterian Church v. Venable*, 159.)

2. REAL PROPERTY—LICENSEES AND PERSONS INVITED. With respect to the safety of the premises of a landowner, he owes a more limited duty to a mere licensee than he does to a person who is there by invitation, either express or implied; but he owes to both the equal duty of not injuring either by his own active negligence, and is liable if he does so. (*Pomponio v. New York etc. R. R. Co.*, 124.)

3. REAL PROPERTY—INVITATION—LICENSE.—A case of invitation to go upon premises exists where the privilege of user is for the common interest or mutual advantage of both parties, but if such privilege exists for the mere pleasure and benefit of the party exercising it, there is simply a case of license. (*Pomponio v. New York etc. R. R. Co.*, 124.)

4. NEGLIGENCE—SETTING OUT FIRE.—An owner has a right to kindle a fire upon his premises for the purpose of reducing his land to cultivation, providing he does so at a proper time, under ordinarily favorable circumstances, and in a reasonable prudent manner. In such case, he is not liable to an adjoining owner for injury arising from the spread of the fire, unless he is guilty of negligence in not using proper care to prevent its spread. (*Brummit v. Furness*, 215.)

5. NEGLIGENCE—SETTING OUT FIRE.—One who negligently sets or negligently manages a fire set on his own property is liable to his immediate neighbor for damage caused to him by the spread of the fire onto such neighbor's property, whether the fire is communicated through the air or along or under the ground. The gist of the action is negligence. If that exists, either in setting or caring for the fire, and injury to another happens therefrom, liability attaches. It is immaterial whether such negligence is gross or only ordinary. (*Brummit v. Furness*, 215.)

6. SETTING OUT FIRE.—One who sets a fire on his own premises, immediately surrounded by highly combustible and inflammable material up to the very border of the adjoining owner's land, and from there on indefinitely, is guilty of negligence under any circumstances, and liable for the injury to his neighbor's property,

If the fire is communicated thereto, whether he used ordinary precaution to prevent the fire from spreading or not. (*Brummit v. Furness*, 215.)

RECEIVERS.

1. RECEIVERS—COMPENSATION, BY WHOM FIXED.—The clerk of the court is not the proper officer to settle the amount of a receiver's fees and expenses. That is a judicial question; it, and all matters relating thereto, the court should dispose of in its final decision. (*Cuttler v. Pollock*, 644.)

2. CORPORATIONS—RECEIVERS OF, RIGHT TO SUE.—After a receiver has been appointed for and has taken possession of the corporate property, he represents the creditors, and is the proper person to maintain an action to set aside chattel mortgages on the corporate property, as the rights of the creditors in that respect become vested in him. (*National State Bank v. Vigo County National Bank*, 330.)

See Costs; Insurance, 7.

RECORDS.

See Vendor and Purchaser, 1.

REGULATIONS.

See Telegraph Companies, 2, 3; Water Companies, 1-3.

REIMBURSEMENT.

See Guardian and Ward.

RELATION.

See Schools, 2.

REMAINDERS.

See Estates, 2.

REMAINDERMEN.

See Partition.

REMEDIES.

See Nuisance, 2.

RENT.

See Cotenancy, 1.

REPLEVIN.

1. REPLEVIN—DETENTION.—The selling of property to another without right is, in effect, a detention of it from the true owner. (*Helman v. Withers*, 295.)

2. REPLEVIN LIES where property has been unlawfully taken, or is unlawfully detained. (*Helman v. Withers*, 295.)

3. REPLEVIN—DETINUE.—The whole ground of both detinue and replevin is now covered by the code provision of Indiana for the recovery of personal property. (*Helman v. Withers*, 295.)

4. REPLEVIN—DEFENSE.—It is no defense to an action of replevin against one who has obtained the possession of the plaintiff's property without right, that the defendant has transferred the pos-

session either before or after the commencement of the suit. (*Holman v. Withers*, 295.)

REPUTATION.

See False Imprisonment, 1.

RESCISSION.

See Contracts, 5; Vendor and Purchaser, 11-16.

RES JUDICATA.

See Judgments, 4, 5.

RETROSPECTIVE.

See Statutes, 6, 7.

REVERTER.

See Real Property, 1.

REVOCATION.

See Trusts, 5, 6.

RIPARIAN RIGHTS.

See Waters, 1-11.

SALES.

1. **SALES UPON CONDITION.**—A consignment of goods to the consignee, under a contract stipulating that he shall sell the goods to some third person, that, until they are so sold, he is under no obligation to pay the consignor the cost price, and, until so sold, he may be compelled to surrender the goods to the consignor at any time, is a sale upon condition. Prior to sale by the consignee to a third person, the former has no title to the goods which can be the subject of levy or sale upon execution for his debts. (*Vermont Marble Company v. Brow*, 37.)

2. **RETENTION OF TITLE.**—THE SELLER OF GOODS MAY, by appropriate contract, retain the title thereto until performance of some valid condition on the part of the buyer. The fact that the property is to be resold by the latter does not affect the rule. (*Vermont Marble Company v. Brow*, 37.)

3. **SALES — DEFECTS — WARRANTY.**—In executed sales, the buyer takes the thing sold with all defects, if there is neither warranty nor fraud. (*Court v. Snyder*, 247.)

4. **WARRANTY.**—A sale for a sound price implies no warranty of soundness. (*Court v. Snyder*, 247.)

5. **SALES — WARRANTY.**—In executed sales, without express warranty, no warranty is implied. (*Court v. Snyder*, 247.)

6. **WARRANTY.**—Without willful misrepresentation or artful device to disguise the character or conceal defects in a thing sold, the vendee is bound by the contract, even though the vendor gets a decided advantage, and puts off on the vendee a defective article. (*Court v. Snyder*, 247.)

7. **SALES—IMPLIED WARRANTY OF QUALITY—MEASURE OF DAMAGES.**—In executory sales, as of a large quantity of brick to be delivered from time to time, an implied warranty of quality exists, and the purchaser is not bound to return the goods and re-

scind the contract, upon discovering a breach, but may set up his damages by reason thereof in a cross-action. The measure of damages is the difference in value between the articles sold and those delivered, at the time and place of delivery. (*Bushman v. Taylor*, 228.)

8. WARRANTY BY AGENT.—A seller is not bound by express warranties made by an auctioneer or other special agent, unless he has specifically authorized such warranty. (*Court v. Snyder*, 247.)

9. SALES—LATENT DEFECTS.—That the seller is aware of a latent defect in an animal sold does not amount to fraud, unless he makes some statement or uses some act or device calculated to deceive the buyer, or to induce him not to make inquiry. (*Court v. Snyder*, 247.)

See Agency, 1; Evidence, 1; Interstate Commerce, 3, 4.

SCHOOLS.

1. CONTRACT TO EMPLOY ONE AS A TEACHER IN THE PUBLIC SCHOOLS who has no certificate entitling him to do so, is void. (*Hosmer v. Sheldon School Dist.*, 639.)

2. RELATION.—A certificate granted to one, authorizing him to teach in the public schools, cannot, by relation, take effect at any prior time, so as to validate a contract previously entered into between him and the school district employing him as a teacher therein. (*Hosmer v. Sheldon School Dist.*, 639.)

SCIRE FACIAS.

1. SCIRE FACIAS—CONCEALED CONVEYANCE.—If a judgment debtor remains in possession of land of which he has made an unrecorded conveyance, of which the plaintiff has had no notice, the judgment may be revived by scire facias, though the grantee is not a party thereto. He is not a terre tenant of the land, and has no interest of which the plaintiff is bound to take notice. (*Lyon v. Cleveland*, 782.)

2. AN AMICABLE SCIRE FACIAS against the judgment debtor has the same effect as a revival of the judgment by writ of scire facias regularly issued, and therefore binds his grantees who have not taken possession nor recorded their conveyance, if the plaintiff has no notice thereof. (*Lyon v. Cleveland*, 782.)

3. A SECOND SCIRE FACIAS cannot be prosecuted against a judgment debtor on the ground that, before the prosecution of the first, he had made a conveyance of which the plaintiff had no notice, actual or constructive. Because of his want of such notice, he did all he was required to do, and the scire facias has the same effect as if the grantee had been known and had been made a party thereto. (*Lyon v. Cleveland*, 782.)

SEAL.

See Corporations, 9, 14.

SENTENCE.

See Trial, 6.

SERVICES.

See Husband and Wife, 7, 8.

SERVITUDES.

See Municipal Corporations, 6, 7.

SETOFF.

See Landlord and Tenant, 4.

SETTLEMENTS.

1. DELIVERY.—VOLUNTARY SETTLEMENTS are binding on the grantor if properly made, unless there is clear and decisive proof that he never parted with, or intended to part with, the possession of the deed, and, even if he retained it, the weight of authority is in favor of its validity, unless there are other circumstances to show that it was not intended to be absolute. (*Shults v. Shults*, 188.)

2. SETTLEMENTS—CONSIDERATION.—A fully executed, voluntary settlement for the benefit of the settler's children, does not require other consideration for its support than that of parental affection and duty. (*Nichols v. Emery*, 43.)

3. VOLUNTARY SETTLEMENTS, DELIVERY.—There are stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements than of conveyances of bargain and sale. (*Shults v. Shults*, 188.)

SEWERAGE.

See Waters, 23.

SHERIFFS.

1. DEEDS—EVIDENCE.—A RECITAL IN A SHERIFF'S DEED, under foreclosure proceedings by advertisement, that the grantee therein is "the Globe Investment Company, formerly Dakota Mortgage Loan Corporation," is no evidence that such company succeeded to the rights of such corporation. (*Hannah v. Chase*, 656.)

2. SHERIFFS—VERITY OF RETURN.—A sheriff's indorsement upon a summons, showing the date of its delivery to him, must be taken as true, and to import absolute verity, until impeached by some adequate proceeding. It will stand as against an affidavit of the plaintiff in the action contradicting it, in a subsequent proceeding in the same case to procure an order of substitution and continuance of the action in the name of the defendant's executrix. (*White v. Johnson*, 726.)

3. SHERIFF'S DEED TO ASSIGNEE.—If a sheriff executes a certificate of purchase to one party, and subsequently issues a deed to another, it is not presumed that the latter has succeeded to the rights of the former. (*Hannah v. Chase*, 656.)

See Arrest, 9; Execution, 14; Process, 1, 2.

SILENCE.

See Estoppel.

SPECIFIC PERFORMANCE.

RAILWAY CORPORATIONS, SPECIFIC PERFORMANCE OF CONTRACT TO GIVE TRAFFIC TO.—Equity will compel the specific performance of a contract to give to a railway corporation all traffic to and from the mines and furnaces of a mining corporation, where the railway corporation, on its part, agrees by such contract to carry such traffic for fair and reasonable charges. (*Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co.*, 807.)

STATES.

1. STATE CONTRACTS, DISCRETION IN AWARDED.—Under a statute directing the state furnishing board to let, to the "lowest re-

sponsible bidder," a contract for the publication and annotation of the state codes, the board does not "wrongfully," or "arbitrarily," exercise its discretion by rejecting a bid, although it is the lowest, and is accompanied by an offer of adequate security, where it appears, that bidders exhaustively discussed and explained their bids before the board, as well as their capacity to perform the work; that the board acted with deliberation, and took adjournments to make further inquiries; and that, after considering all the facts and information which it could reasonably be expected to obtain, it determined that the unsuccessful bidder did not have the facilities to do the work. (State v. Rickards, 476.)

2. STATE CONTRACT—WHO IS NOT "INTERESTED."—The constitutional provision, that no member or officer of any department of the government shall be in any way interested in a contract for public printing, is not violated by awarding a contract for state printing to a publishing company, whose business manager is, at the time, a member of the state legislature, where he has no interest in the profits of the company, but simply receives a fixed salary for his services. (State v. Rickards, 476.)

See Interest; Officers, 1, 2; Statutes, 6, 7.

STATUTE OF FRAUDS.

See Brokers, 3.

STATUTES.

1. CONSTITUTIONAL LAW—TITLES OF STATUTES.—A constitutional provision, that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title," does not prohibit comprehensive titles, but is intended to prevent surreptitious legislation. (Paxton etc. Land Co. v. Farmers' etc. Land Co., 585.)

2. CONSTITUTIONAL LAW—TITLE OF STATUTE.—In an act entitled, "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes," the word "irrigation" is used in its popular sense, and implies the means of conducting water to the land to be supplied. A provision in such act for the acquiring, by irrigating companies, a right of way for canals and ditches, is germane to its title, and within the evident purpose thereof. (Paxton etc. Land Co. v. Farmers' etc. Land Co., 585.)

3. STATUTES—CONSTRUCTION.—A proviso in a statute which operates to limit the application of the enacting clause, general in its terms, is to be strictly construed, and includes no case not within the letter of the exception. (Paxton etc. Land Co. v. Farmers' etc. Land Co., 585.)

4. STATUTES—CONSTRUCTION.—If a word in a statute is evidently an interpolation, having no relation to the body of the act, and without sensible meaning, it should be disregarded. (Paxton etc. Land Co. v. Farmers' etc. Land Co., 585.)

5. CONTRACTS—EFFECT OF SUBSEQUENT STATUTE.—A contract cannot be rendered invalid by a statute subsequently passed. (Stephens v. Southern Pac. R. R. Co., 17.)

6. CONSTITUTIONAL LAW—RETROSPECTIVE STATUTE—LIABILITY OF STATE.—If a claim against the state does not bear interest when it accrues, a statute subsequently passed cannot impose a liability upon the state for interest thereon. (Molineux v. State, 49.)

7. CONSTITUTIONAL LAW—GIFT OF INTEREST ON CLAIM.—A retrospective statute conferring a right to recover interest on a claim against the state, upon which no right to recover interest exists prior to the enactment of such statute, creates a gift and is void, under a constitutional provision stipulating that the

legislature shall have no power to make, or authorize the making of, any gift of any public money or thing of value to any individual or corporation. No moral obligation to pay such interest can make the statute constitutional, or make the interest so authorized other than a gift. (*Molineux v. State*, 49.)

. A STATUTE MAY BE PARTLY UNCONSTITUTIONAL WITHOUT BEING WHOLLY VOID. Thus the statute of Pennsylvania relating to anthracite coal mining, though unconstitutional in so far as it attempts to impose liability on mineowners for the negligence or incompetency of foremen whom they are obliged to employ, and whose duties are prescribed by such statute, may be treated as valid, in so far as it defines what shall be regarded as such mines. (*Durkin v. Kingston Coal Co.*, 801.)

9. CONSTITUTIONAL RIGHTS.—A statute declaring that to be a crime which consists alone in the exercise of a constitutional right, as that of terminating a contract, is unconstitutional and void. (*State v. Julow*, 443.)

10. CONSTITUTIONAL LAW.—A STATUTE REQUIRING OWNERS OF MINES to employ no foremen except those which had been examined by a board created by the act and furnished a certificate of their competency, and providing that such foremen shall perform their duties in the manner prescribed in the act, and that if any injury result to person or property from a mining foreman not discharging his duties, the mineowner should be answerable therefor, is unconstitutional and void. Such foremen must, under the provisions of this statute, be deemed agents or officers of the state, for whose negligence or incompetency a mineowner cannot be made answerable. (*Durkin v. Kingston Coal Co.*, 801.)

11. EMPLOYER AND EMPLOYÉ.—A STATUTE WHICH ATTEMPTS to make it a crime for an employer to insist, and to impose as a condition of employment, or continued employment, that his employé shall withdraw from or refrain from joining any trade or labor union, is unconstitutional and void, as seeking to deprive the employer of a constitutional right without due process of law. (*State v. Julow*, 443.)

12. EMPLOYER AND EMPLOYÉ—CLASS LEGISLATION.—A statute making it an offense for an employer to impose as a condition to employment, or continued employment, that his employé shall not belong to a trade or labor union, is unconstitutional, and void as class or special legislation. (*State v. Julow*, 443.)

See Insurance, 13; Irrigation; Time, 3.

STOCK.

See Corporations, 2-4-8, 19, 20; Judgments, 4.

STOCKHOLDERS.

See Corporations, 5-8.

STREET RAILWAYS.

See Railroads, 32.

STREETS.

See Highways; Municipal Corporations, 8-10; Towns.

SUBAGENTS.

See Agency, 2-4.

SUBROGATION.

See Insurance, 5.

SUBSTITUTION.

See Parties.

SUMMONS.

See Attachment, 2, 3; Process.

SUNDAY.

See Railroads, 19.

SURETYSHIP.

SURETYSHIP—LIABILITY OF PRINCIPAL.—If no cause of action exists against a principal on a bond, there can be none against the surety. Hence, if a cause of action for the breach of the condition of a bond, as for converting moneys received as a collector to the obligor's own use, is fraudulently concealed by the principal, so that in law it cannot be deemed to have accrued, as against him, until first discovered by the plaintiff and obligee, it cannot be deemed to have accrued before such discovery as against the surety. (*Eising v. Andrews*, 75.)

See Limitations of Action, 2; Officers, 4-7, 9.

TAXES.

TAXATION, COLLATERAL ATTACK.—The collection of taxes cannot be restrained, in an action brought by a private citizen, on the ground that the property taxed had not been duly annexed to a municipality, where proceedings had been taken under authority of law looking to such annexation, and had been declared to be carried, and the municipality had exercised jurisdiction for several years over the territory claimed to have been annexed. (*Kuhn v. Port Townsend*, 911.)

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES ARE NOT COMMON CARRIERS, in the absence of a statute making them such. They may stipulate for limitation of their liability for errors arising from any cause except willful misconduct or gross negligence. (*Birkett v. Western Union Tel. Co.*, 374.)

2. TELEGRAPH COMPANIES—EFFECT OF REGULATIONS UPON BLANKS.—The sender of a telegraphic message, written upon a blank supplied by the company, and signed by the sender, is bound by reasonable regulations printed thereon, whether he has actual knowledge thereof or not, and cannot recover for delay in the transmission of the message, in the absence of gross negligence or willful misconduct on the part of the company or its servants. (*Birkett v. Western Union Tel. Co.*, 374.)

3. TELEGRAPH COMPANIES—REGULATIONS LIMITING LIABILITY.—A regulation by a telegraph company limiting its liability for mistakes or delays in the transmission or delivery, or for the nondelivery, of any unrepeatd message, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the message is reasonable and valid. (*Birkett v. Union Tel. Co.*, 374.)

4. TELEGRAPH COMPANIES—DELAY IN TRANSMISSION—GROSS NEGLIGENCE.—If a telegraph company has provided

suitable instruments and competent operators, the failure of an operator to make proper connections, thus causing delay in the transmission of a message, is not gross negligence for which the company is liable, when it has stipulated for nonliability for delays in the transmission of messages. (*Birkett v. Western Union Tel. Co.*, 874.)

TICKETS.

See Railroads, 18-22, 24.

TIME.

1. THE TERM "MONTH," at common law, meant a lunar month of twenty-eight days, except in ecclesiastical affairs, and as applied to commercial paper; but, in this country, it is understood to mean a calendar month. (*McGinn v. State*, 617.)

2. A CALENDAR MONTH IS TO BE COMPUTED, not by counting days, but by looking at the calendar. It terminates with the day numerically corresponding to the day of its commencement, less one in the following month. Thus, if a term of three calendar months begins with the ninth day of April, it ends at midnight on the eighth day of July. (*McGinn v. State*, 617.)

3. TIME WHEN STATUTES GO INTO EFFECT. — If a constitution declares that no act shall take effect until three calendar months after the adjournment of the session at which it is passed, a statute enacted on the ninth day of April becomes a law at the first moment of the ninth day of July. This remains true, though another statute declares that the time within which an act is to be done shall be computed by excluding the first day and including the last. (*McGinn v. State*, 617.)

TORTS.

TORTS.—THE RULE AS TO WRONGS IS, that in acts mala in se, the intent governs, but in those mala prohibita, the only inquiry is, has the law been violated? (*Leggatt v. Prideaux*, 498.)

See Insane Persons.

TOWNS.

STREETS—TOWNSITE ACT.—The original claimant of a lot in a townsite, entered according to the federal and territorial laws relating thereto, is not the owner in fee of the street or alley upon which his lot abuts. (*Loeber v. Butte etc. Electric Co.*, 468.)

TRADEMARKS.

1. TRADE NAME—FRAUDULENT INFRINGEMENT. — Although there can be no exclusive property in a trade name, it is a fraud on one who has established a trade and carried it on under a given name for some other person to assume the same name, or the same name with a slight alteration, in such manner as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to such name. Such fraud may be proved. (*Weinstock v. Marks*, 57.)

2. TRADE NAMES—INFRINGEMENT. — One who built up a business under the name of "Mechanics' Store" is entitled to an injunction restraining another from the use of the words "Mechanical Store" as a designation of his business for the purpose of deceiving the public, and especially the former's customers, and thereby securing the benefits of the goodwill of his business. (*Weinstock v. Marks*, 57.)

See Injunctions, 1-4.

TRIAL.

1. **TRIAL BY JURY CAN BE DEMANDED** in an action by the assignee of an account. (McCoy v. Oldham, 208.)

2. **TRIAL—RIGHT TO JURY.**—In determining what suits are triable by jury, the court must look to the character of the questions to be decided, and if they are essentially of an equitable nature, or if some essentially equitable remedy is invoked, as contradistinguished from legal questions and remedies, the case should be tried by the court. Otherwise, the parties are entitled to a jury. (McCoy v. Oldham, 208.)

3. **TRIAL—VENIRE DE NOVO.**—The failure of the jury to find upon all the issues is not a defect appearing upon the face of the verdict for which a venire de novo will be awarded. (Adams v. Main, 266.)

4. **PRACTICE—REVISION AND REJECTION OF INTERROGATORIES.**—The court may properly revise and modify interrogatories offered by the parties, to make them correspond with the facts involved, and it may reject such as, however answered, will not control the general verdict. (Taylor v. Wootan, 200.)

5. **EVIDENCE—ADMISSIBILITY—WAIVER OF OBJECTION.**—The right to object to the admission of evidence is waived by a subsequent admission that such evidence will not be controverted. (Chicago etc. R. R. Co. v. Wolcott, 320.)

6. **CRIMINAL LAW—PRONOUNCING SECOND SENTENCE.**—If a person convicted of murder is sentenced to be executed at a day designated, and, in the mean time, to remain in solitary confinement, he may, at a subsequent day, be again brought before the court, and sentenced to be executed at a later day, if the first sentence was, for some cause, irregular. Though the prisoner has suffered part of the solitary confinement, it is not a part of the sentence, but a means adopted to make more certain that he may be produced at the time fixed for his execution. (McGinn v. State, 617.)

See Instructions.

TRUSTS.

1. **TRUSTS.—IT IS ESSENTIAL** to the creation of a valid express trust, that some estate or interest be conveyed to the trustee, and, when the instrument creating the trust is other than a will, the estate or interest must pass immediately, but it is not essential that it must be enjoyed immediately. The enjoyment of the interest may be made to commence in future, and to depend, for its commencement, upon the termination of an existing life or lives, or of an intermediate estate. (Nichols v. Emery, 43.)

2. **TRUSTS TO AVOID ADMINISTRATION.**—A person may dispose of his property in his lifetime to avoid administration of his estate after death, either by gifts absolute during his life, or by gifts in trust during his life, or by voluntary settlements, and such disposition shows, not only an absence of testamentary intent, but an absolute hostility thereto. (Nichols v. Emery, 43.)

3. **CHANCERY PRACTICE.—THE ANSWER OF ONE OF TWO TRUSTEES** who are charged with having notice of an outstanding equitable title when they received a conveyance of the property, when he does not claim to have any personal knowledge respecting the notice to his cotrustee, merely presents an issue throwing the burden of proof upon the complainant, but does not require him to overcome the denial of the answer by the testimony of two witnesses, or by one witness accompanied by strong, corroborating circumstances. (Chapman v. Chapman, 846.)

4. NOTICE TO ONE OF TWO TRUSTEES, of an equitable title held by a third person to lands conveyed to them for the benefit of creditors, is notice to both. (*Chapman v. Chapman*, 846.)

5. TRUSTS—REVOCATION—RESERVATION OF POWER OF. The fact that a grantor in a conveyance creating a trust reserves a power of revocation, does not impair the trust, nor affect its character as such. It remains operative until the right to revoke is exercised in due form. (*Nichols v. Emery*, 43.)

6. TRUSTS—POWER OF REVOCATION.—If an owner of land conveys it to a trustee, upon certain trusts to be executed after the death of the grantor, reserving in the conveyance a power of revocation, and remaining in possession during his lifetime without exercising the power, the conveyance operates to immediately vest in the trustee so much of the estate as is necessary to carry out the purposes of the trust. The grantor retains a life estate entitling him to remain in possession, or to lease the land and retain the profits. The reservation of power to revoke the trust does not operate to destroy the conveyance as a trust, nor make it a will or testamentary disposition of the property. (*Nichols v. Emery*, 43.)

See Insurance, 10.

USURY.

1. THE DEFENSE OF USURY cannot be maintained against a bona fide holder of a negotiable instrument, acquired before maturity, for value, unless the statute declares such instrument to be void. (*Lynchburg Nat. Bank v. Scott*, 860.)

2. USURY.—THE DEFENSE of usury cannot be asserted against a bona fide holder of a note received in due course of business, without notice of any taint of usury, and at a lawful rate of discount, where the statute of the state controlling the subject merely declares that all contracts for a loan of money at a greater interest than allowed by law should be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned. (*Lynchburg Nat. Bank v. Scott*, 860.)

VACATING.

See Judgments, 9-11.

VENDOR AND PURCHASER.

1. NOTICE.—RECORD OF DULY EXECUTED mortgages or conveyances, not absolutely void, is constructive notice to purchasers and subsequent incumbrancers. (*Roby v. Bismarck Nat. Bank*, 633.)

2. PURCHASERS FOR VALUE, WHO ARE.—Trustees to whom property has been conveyed for the benefit of creditors are purchasers for value. (*Chapman v. Chapman*, 846.)

3. NOTICE.—THE POSSESSION OF REAL PROPERTY by one who has purchased and paid for it, but has not received a conveyance of the legal title, is notice to the world of his right and claim. It is the duty of an intending purchaser to inquire into the fact of the possession of the property, and he will be affected with notice of whatever right or interest the party in possession may have which such inquiry would have disclosed. (*Chapman v. Chapman*, 846.)

4. VENDOR AND VENDEE.—THE POSSESSION OF A VENDEE who has paid the entire purchase price, and is entitled to a conveyance, cannot be regarded as adverse to his vendor. Before such possession can become adverse, the vendee must have dissevered the privity of title between him and his vendor by the assertion of an adverse right, and openly and continuously disclaiming the title of the vendor, and have brought such disclaimer home to the latter or his successor in interest. (*Chapman v. Chapman*, 846.)

5. NOTICE — BONA FIDE PURCHASERS — BURDEN OF PROOF.—One who sets up the defense of subsequent purchase in good faith, without notice, must affirmatively show a purchase for value, and that the purchase money has been paid before notice. (Davis v. Ward, 29.)

6. VENDOR AND VENDEE—BONA FIDE PURCHASER—NOTICE OF MISTAKE IN MORTGAGE.—The record of a mortgage, in which the land described does not belong to the mortgagor, does not give constructive notice of the mistake to the purchaser of the land owned by the mortgagor, and who has paid the purchase money without actual notice of the mistake. Such mistake cannot be corrected against him. (Davis v. Ward, 29.)

7. NOTICE—PAYMENT OF PART OF PURCHASE PRICE.—One who claims to be a bona fide purchaser without notice, but has paid a part only of the purchase price before notice of an outstanding equity, is entitled to protection only as to the amount paid before such notice. The holder of the equity can enforce his claim to the whole land only upon condition of his doing equity by refunding to such purchaser the amount paid before notice. (Davis v. Ward, 29.)

8. PAYMENT OF PART OF PURCHASE MONEY AND MORTGAGE FOR REMAINDER.—If a purchaser, after paying part of the purchase price, executes a mortgage upon the land to secure notes for the remainder without notice of any outstanding equity against the land, and the mortgagee assigns such security and notes to a bank without notice to any of the parties of such equity, the notes operate as payment, and both the purchaser and the bank are protected as bona fide purchasers. (Davis v. Ward, 29.)

9. VENDOR'S LIEN.—If the purchase of land is evidenced by contract alone, the purchase price not being paid, and the vendor retaining the legal title as security for the unpaid purchase money, he holds a lien upon the land, independent of his equitable lien, for the unpaid purchase price, by virtue of the contract; and such lien the vendee cannot, by conveyance or otherwise, affect, impair, or extinguish, except by payment of the purchase money. (Roby v. Bismarck Nat. Bank, 633.)

10. VENDOR AND PURCHASER—FORFEITURE OF PARTIAL PAYMENTS.—One who purchases personal property and pays part of the price, and afterward, without any fault of the vendor, refuses to receive it, or to pay the balance due, forfeits the whole of the amount so paid, although the vendor afterward sells the property to another, and thereby realizes a sum greatly in excess of that due him from the original purchaser. (Nels v. O'Brien, 894.)

11. VENDOR AND VENDEE—RESCISSION.—Whenever a purchaser has been induced by a material misrepresentation of the vendor to buy, he has the right to repudiate the contract—a right correlative with that of the vendor to disaffirm the sale when he has been deceived. (Soll v. Carpenter, 824.)

12. RESCISSION.—MEANS ON THE PART OF A PURCHASER OF DISCOVERING that a representation was false do not destroy his right to rescind. (Wilson v. Carpenter, 824.)

13. RESCISSION—MISREPRESENTATION.—THE INTENT of the person making a misrepresentation for the purpose of inducing a purchase of property is wholly immaterial. It is sufficient to sustain the right of rescission that the statement was made, so as to mislead the party to whom it was made, and that it induced the purchase by him. He cannot be held to his contract on the ground that the person making the misrepresentation believed it to be true. (Wilson v. Carpenter, 824.)

14. RESCISSION.—A MISREPRESENTATION to a purchaser of a lot in a village, that a large sum, specifying the amount, is to be invested therein in a manufacturing enterprise, if it was the inducing cause of the purchase, entitles him to rescind. (*Wilson v. Carpenter*, 824.)

15. RESCISSION—BURDEN OF PROOF.—If a seller makes a misrepresentation which, from its nature, may induce the buyer to enter into a contract of purchase on the faith of it, it will be inferred that he was induced thereby to contract; and he need not prove that he in fact relied upon the representation. To rebut this presumption, the seller must either prove that the purchaser had knowledge of facts showing the representation to be false, or he stated in terms, or showed by his contract, that he acted upon his own judgment. (*Wilson v. Carpenter*, 824.)

16. VENDOR AND PURCHASER — RESCISSION OF SALE. —A grantee of land conveyed with warranty has a remedy upon the covenants of his deed for a failure of title, and, if a perfect title is tendered by the grantor before a decree is rendered, the contract will not be rescinded unless it appears to the court that the grantee has sustained some loss, injury, or damage, by reason of the delay in perfecting the title. (*Bradtfeldt v. Cooke*, 701.)

VENDOR'S LIEN.

See Vendor and Purchaser, 9.

VENIRE DE NOVO

See Appeal, 9; Trial, 3.

WAGES.

See Execution, 7.

WAIVER.

WAIVER.—No man can be bound by a waiver of his rights, unless such waiver was distinctly made with full knowledge of the rights which he waived, and the fact that he knows his rights and intends to waive them must clearly appear. (*Wilson v. Carpenter*, 824.)

See Appeal, 2-4, 11; Assignment for the Benefit of Creditors, 6; Definitions; Execution, 6; Insurance, 2; Mortgages, 3.

WARRANTS.

See Arrest.

WARRANTY.

See Insurance, 14-16; Sales, 3-9.

WATCHMEN.

See Railroads, 9.

WATER COMPANIES.

1. THE RULES WHICH A WATER COMPANY MAY PRESCRIBE and enforce must be reasonable, just, lawful, and not discretionary. (*American Water Works Co. v. State*, 610.)

2. A WATER COMPANY HAS A RIGHT TO PRESCRIBE ALL SUCH RULES AND REGULATIONS for its convenience and security as are reasonable and just, and to refuse to furnish water to any person who declines to comply with them. (*American Water Works Co. v. State*, 610.)

3. WATER COMPANIES.—A RULE REQUIRING THE PAYMENT OF ONE DOLLAR by every person from whose premises water has been turned off for nonpayment of water rates, as a charge for turning the water off and for then turning it on again, is unreasonable. The company may, by mandamus, be compelled to turn such water on, on the payment or tender to it of the same price at which it would be turned on for a person who had not before used water, and had, therefore, never been in default. (*American Water Works Co. v. State*, 610.)

4. A WATER COMPANY, HAVING A FRANCHISE TO FURNISH WATER TO A CITY AND ITS INHABITANTS, assumes a public duty, part of which is to furnish water to all such inhabitants at reasonable rates, and not to charge any of them prices not charged to all others for a like service and under similar conditions. (*American Water Works Co. v. State*, 610.)

WATERS.

1. RIPARIAN OWNERS ON A NAVIGABLE STREAM hold only to the water's edge. (*Cox v. Arnold*, 450.)

2. RIPARIAN RIGHTS—BOUNDARIES.—A riparian owner's boundary expands as the waters recede and accretions form to his land, and it contracts as the waters encroach upon and wash away his land. (*Cox v. Arnold*, 450.)

3. ACCRETIONS.—A riparian owner cannot recover, as an accretion, land which has reformed within the boundaries of the original survey of his tract at a place where the land was, at the time of such survey, uncovered by water, and which has not accreted to his land beginning at his line at the water's edge. (*Cox v. Arnold*, 450.)

4. ACCRETIONS.—If part of a tract of land bordering on a navigable river is submerged or washed away, the owner cannot regain it, except by accretion beginning at his line at the water's edge. (*Cox v. Arnold*, 450.)

5. ACCRETIONS.—A riparian owner of land acquires, as an incident thereto, without price, whatever may be added to it by gradual and imperceptible accretion, but he assumes the risk of losing it all by its being washed away by the waters of the river, and his boundary line always remains at the water's edge. (*Cox v. Arnold*, 450.)

6. WATERS—MEASURE OF APPROPRIATION.—It is the policy of the law that water of a stream shall be appropriated to the extent only that it is put to, or designed for, some useful or beneficial purpose. This is the measure of the appropriation. (*Wimer v. Simmons*, 685.)

7. WATERS—TIME IN WHICH TO FIX EXTENT OF APPROPRIATION.—When water is appropriated for some useful or beneficial purpose, the entire appropriation need not be at once utilized for the purpose designated, but the use may be made within a reasonable time, to be determined by the circumstances of each case. (*Wimer v. Simmons*, 685.)

8. WATERS—CHANGING USE.—After water has been lawfully appropriated for some beneficial purpose, the place or character of its use may be changed, though such change injuriously affects one who uses the water after it passes from the control of the prior claimant. Hence, if water is appropriated for the purposes of placer mining and

irrigation, and has been used for such purposes for a term of years, the place of its use may be changed at the pleasure of the owners. (Wimer v. Simmons, 685.)

9. **WATERS—PRESCRIPTION.**—In order to establish a right by prescription, the acts relied upon to create such prescriptive right must have been an invasion of the rights of the party against whom it is set up of such a character as to afford him grounds of action. The use of water under a license, or by permission of the prior appropriator, is not hostile, and cannot support a claim of right by prescriptive or adverse user. (Wimer v. Simmons, 685.)

10. **WATERS—PRESCRIPTION.**—After water has been appropriated for mining purposes, and water from the ditch of the prior appropriator is discharged into the stream just above the head of the ditch of the subsequent appropriator, the fact that the subsequent appropriator uses the water so escaping from the ditch of the prior appropriator for a period of fourteen years without interference by the prior appropriator does not create a right to use it by prescription or by adverse possession, as the use, under such circumstances, does not constitute any invasion of the rights of the prior appropriator, it being neither exclusive, adverse, hostile, nor under a claim of right. (Wimer v. Simmons, 685.)

11. **WATERS—ESTOPPEL.**—After water has been appropriated for mining purposes, and water from the prior appropriator's ditch is discharged into the stream just above the head of the subsequent appropriator's ditch, and the prior appropriator is using only a part of his ditch at the time the subsequent appropriator acquires his ditch with notice that his rights are subordinate to those of the prior appropriator, and that the prior appropriator has a right to operate his ditch to its full capacity, and it appears that the subsequent appropriator has never disputed such right, and has never claimed any specific amount of water, the prior appropriator is not estopped from taking enough water to fill his ditch by the fact that he has, for thirteen years, allowed considerable water to escape and go into the subsequent appropriator's ditch. (Wimer v. Simmons, 685.)

12. **WATERS—IRRIGATING DITCH—COTENANCY.**—If persons divert water from a stream, for the purposes of irrigation, by means of a ditch, under an agreement that each shall have his share of the water, they are tenants in common of the ditch and of the right of appropriation, and a continuous use of the water by one of the parties must be presumed to be in maintenance of the rights of all the cotenants. (Moss v. Rose, 743.)

13. **WATERS—IRRIGATING DITCH—ABANDONMENT.**—Though one of the cotenants of an irrigating ditch and of the right of appropriation of water has failed for seven years to put his share of the water diverted to some beneficial use, this does not establish an intention, on his part, to abandon his right, where the evidence shows that, from the time of the appropriation and diversion, he has diligently improved his land, and added materially each year to the area in cultivation, though he has irrigated the tract from other and more convenient sources. (Moss v. Rose, 743.)

14. **WATERS—ABANDONMENT.**—A prior appropriator, having the exclusive right to the use of part of, or all, the water of a stream, may lose the same by abandonment, express or implied. An abandonment by a failure to apply the appropriation to some useful purpose is as effective as an express abandonment. (Wimer v. Simmons, 685.)

15. **WATERS—EFFECT OF ABANDONMENT.**—When a water right is abandoned, the water becomes publici juris, and subsequent appropriators are entitled to it according to their respective priorities. (Wimer v. Simmons, 685.)

16. WATERS—EVIDENCE OF ABANDONMENT, WHEN INSUFFICIENT.—If water is appropriated for mining purposes, and the ditch conveying it is filled up at a certain point by permission of the appropriators with debris from a mine, but upon an agreement that the mine owners shall reopen the ditch upon request, there is no evidence of an intention to abandon the ditch below such point, though that part of it has not been used for fourteen years, where the water is actually employed during that time in that part of the ditch above the obstruction, and it appears that the appropriators have rejected several propositions to reopen the ditch and to furnish water to persons below the obstruction, because it would not pay them; and that they have frequently spoken of the unused part of the ditch as theirs, and have protected it from destruction, and refused to sell it. (*Wimer v. Simmons*, 685.)

17. WATERS—ABANDONMENT—EVIDENCE.—There can be no abandonment of a water right without an intent to abandon, and a relinquishment of the right; but the abandonment is complete when the intention to abandon and the relinquishment of possession unite. Time is not an essential element of abandonment; and the intent to abandon may be inferred from acts and declarations. (*Wimer v. Simmons*, 685.)

18. WATERS—ADVERSE POSSESSION—NONUSER.—A water right may be lost by the adverse possession of another; but nonuser by the owner and adverse user by another for a time equal to that fixed by the statute of limitations for the recovery of real property are necessary to divest title. (*Wimer v. Simmons*, 685.)

19. WATERS—SURFACE.—Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, is not answerable to an adjoining proprietor, although he may thereby cause surface water to flow on the premises of the latter to his damage; but if, in the execution of such enterprise, he is guilty of negligence which is the natural and proximate cause of injury to his neighbor, he is accountable therefor. (*Beatrice v. Leary*, 546.)

20. WATERS—SURFACE.—The rule that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, without liability to an adjoining owner, is subject to the rule that every proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor. (*Beatrice v. Leary*, 546.)

21. WATERS, SURFACE—QUESTION FOR JURY.—The sufficiency of the capacity of ditches dug by a city to carry off surface water, and negligence in their construction, are questions of fact for the jury. (*Beatrice v. Leary*, 546.)

22. WATERS AND WATERCOURSES, POLLUTING.—The owner of lands through which flows a brook or small watercourse is entitled to an injunction to prevent the owners of a cemetery from constructing a sewer through and over their premises, so as to drain into the brook, if the effect of such sewer must be to carry poisonous exhalations from decomposing human bodies into the watercourse, thereby polluting its waters. (*Barrett v. Mt. Greenwood Cemetery Assn.*, 168.)

23. NUISANCES.—AN INCORPORATED CITY OR TOWN WILL NOT BE PERMITTED to empty its sewerage into a stream of water, where the result is the pollution thereof. (*Barrett v. Mt. Greenwood Cemetery Assn.*, 168.)

See Injunctions, 4, 5; Irrigation; Municipal Corporations, 12-15.

WILLS.

1. **WILLS.—THE TRUE TEST** of the character of an instrument, as to whether it is a will, is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest. The essential characteristic of an instrument testamentary in its nature is, that it operates only upon, and by reason of, the death of the maker and is ambulatory, and that by its execution the maker has parted with no rights and divested himself of no part of his estate. (Nichols v. Emery, 43.)

2. **WILLS — EXECUTION — SIGNATURE.**—A declaration by a testator to certain persons that an instrument is his will, and his request to them to attest it as his will, is sufficient proof of its due execution as such, although it is signed with a mark between the words of his name, and none of the witnesses saw him attach such mark before they attested the instrument. (Stephens v. Stephens, 454.)

3. **INSANE DELUSIONS.**—A man may be of sound mind in regard to his dealings in general while he is under an insane delusion, and whenever it appears that his will was the direct offspring of his partial insanity or monomania, which was the cause of the disposition made by him of his property, and that without it such disposition would not have been made, it should be disregarded. (Thomas v. Carter, 770.)

4. **IF A MONOMANICAL DELUSION, HAVING NO FOUNDATION IN FACT.** is entertained by a testator toward his wife, daughter, or other heir, and is shown to have been the operative motive which caused the disinheriting of him or her by his will, it must be disregarded as being the product of an insane delusion. (Thomas v. Carter, 770.)

See Evidence, 12; Negotiable Instruments, 1.

WITNESSES.

1. **WITNESSES—MENTAL COMPETENCY.**—If preliminary objection is made that a witness is not mentally competent to testify, the court must examine him and hear such testimony as is proper in regard to his mental condition, and determine if he is competent to testify. If the court so decides, the weight of the testimony of the witness is for the jury to determine. (Bowdle v. Detroit etc. R. R. Co., 366.)

2. **WITNESSES—MENTAL COMPETENCY.**—If, after a witness has testified, evidence is introduced of his mental incompetency to testify, the jury must determine such competency, as well as the weight to be attached to the testimony of such witness. (Bowdle v. Detroit etc. R. R. Co., 366.)

3. **WITNESSES—MENTAL COMPETENCY.**—A person affected with insanity is competent as a witness, if he has sufficient understanding to comprehend the obligation of an oath, and is capable of giving a lucid account of such matters as are in dispute. (Bowdle v. Detroit etc. R. R. Co., 366.)

4. **WITNESSES.—IN AN ACTION FOR THE ALIENATION OF A WIFE'S AFFECTIONS.** It is improper to ask the husband, on his cross-examination as a witness, after he has testified in chief that he witnessed certain acts and conduct between his wife and the defendant, whether he inferred adultery from such acts and conduct, as

this calls for the statement of a conclusion, and not a fact. (Adams v. Main, 266.)

5. EVIDENCE — EXPERTS. — IF BOOKS, RECORDS, PAPERS AND ENTRIES ARE VOLUMINOUS, and of such character as to render it difficult for the jury to arrive at a correct conclusion as to amounts and balances, accountants may be allowed to examine such documents, and to testify to the result. (Chicago etc. R. R. Co. v. Wolcott, 820.)

See Accessories, etc.; Appeal, 12.

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